ARGUMENT.

OF

D. M. DELMAS, Esq.

Counsel for the Bondholders in the Case of the

DUPONT STREET BONDS.

BEFORE THE SUPREME COURT OF CALIFORNIA,

AUGUST 14th and 16th, 1886.

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May it please your Honors:

These proceedings are, in form, a suit in equity to enjoin the collection of a tax. In substance, they are an attempt to repudiate the payment of one million dollars of bonds, issued by the City of San Francisco in payment of a great public improvement. Representing the interests of persons who have invested their money in the bonds issued under the statute commonly called the Dupont Street Act, I shall address myself solely to the questions which affect the validity of the bonds.

It appears that, in 1876, the Legislature of the State passed an Act providing the means and pointing out the machinery for widening Dupont Street, in the City of San Francisco. The Act was not to go into operation until the Board of

Supervisors had, by due resolution or order, expressed their judgment that it was expedient to widen the street in accordance with, and in the mode prescribed by, said Act. The Mayor, Auditor and Surveyor of the city were constituted a Board of Commissioners to carry out the provisions of the Act. They were to appraise the damages and benefits accruing from the opening of the street. Their report was to be approved and confirmed by the County Court. After the final confirmation of the report, bonds of the City of San Francisco, payable in twenty years, were to issue, and be sold at not less than ninety-five cents on the dollar, to pay for the cost of widening the street.

It appears that the Board of Supervisors, in due time, passed the resolution and order provided for by the Act; that the Board of Commissioners made their report to the Court, and the Court approved and confirmed it; that, thereupon, one million dollars of bonds of the City of San Francisco, signed by its Mayor, Auditor and Surveyor, and bearing its seal, were issued and sold; and that the street was then opened, and has ever since remained a public street of the city.

These bonds are in the hands of persons who bought and paid for, or otherwise acquired them in good faith. They are held not only by private

individuals, but by public institutions—the University of California, alone, having $40,000 of them.

A proceeding, which would now permit the city, while retaining and enjoying the fruits of these bonds, to repudiate its obligation, may be justified by some rule of law; but, in the minds of ordinary men, must appear repugnant to the plainest dictates of justice and fair dealing. I hope to show that a proper construction of the law and the proceedings had under it will avoid these unjust results.

I shall, in the following argument, seek to establish these specific propositions:

1. The Dupont Street Act is free from any constitutioual objection.

2. The proceedings provided by said Act for the widening of Dupont Street have been strictly followed by the Board of Supervisors, the Board of Commissioners, and the County Court.

3. The judgment of the County Court is a conclusive adjudication in all collateral actions, that (1) the steps required to be taken by the Supervisors and Commissioners to give validity to their proceedings have been duly taken according to the law; and (2) that the Act itself is constitutional.

4. The bonds issued under the Act are negotiable, and have all the qualities and privileges of commercial paper, and the intervenors are bona fide holders thereof.

5. These bonds being executed and issued by the Board of Commissioners, the recital therein, that they are issued in pursuance of the Statute is, in favor of a bona fide holder, a conclusive adjudication that everything which the Act required the Commissioners to do was done by them; that is, that all the steps between the adoption of the resolution by the Board of Supervisors and the judgment of the County Court were regularly taken.

6. The City of San Francisco is estopped to deny the validity of these bonds, because, (1) its retention of the fruits of the bonds estops it from alleging any informality in the proceedings which led up to their issue; and (2) its own action in voluntarily adopting the Statute, and reaping the benefits conferred by it, estops it from avoiding the burdens which the Act imposes, upon the ground of its unconstitutionality.

7. If these bonds are valid against the municipality, their validity can not be attacked by any member of the municipality.

Though the importance of the cause and the fact that the Court has ordered a reargument will warrant and demand a full discussion of the questions, both upon principle and authority, yet I cannot forbear expressing my conviction that such a discussion is really foreclosed, first, by the estoppel created against the plaintiffs by the statute itself; and, secondly, by the decision of this Court in the analogous case of *San Francisco* vs. *Certain Real Estate*, 42 Cal.

First.—The statute provides the mode and machinery for the widening of Dupont Street. The Act, however, is to remain inoperative, unless the Board of Supervisors of the municipality express their judgment, by ordinance, that it is "expedient that Dupont Street be widened in accordance with and in the mode prescribed by this Act." (§ 21). Should such judgment be expressed by the Supervisors, the Board of Dupont Street Commissioners, created by the Act, are to give published notice that the Board is organized (§ 6). Within thirty days from said publication, the owners of a majority in value of the property fronting on the street may interpose their veto to the further prosecution of the work (§ 12). Should no such veto be interposed, the Board of Commissioners are to proceed with the making of an estimate of damage occasioned and benefits conferred by the opening of the street within a dis-

trict, whose limits are actually given by the Act (§ 7). When these labors of the Board are ended, they embody them in the shape of a written report. Such report, as soon as completed, is left for thirty days in the office of the Board for the inspection of all parties interested, and notice that the same is so open for inspection is given, for twenty days, in the public journals (§ 7). At any time within the thirty days mentioned, any person in interest may file, in the County Court, his written objections to the report. The Court is empowered to hear and pass upon the objections so made (§ 8). When the report of the Board is finally confirmed and approved by the County Court, the Board issue bonds of the City and County of San Francisco in a sum sufficient for the payment of the damages awarded (§ 9). Parties to whom damages are awarded must, before receiving payment thereof, execute a deed of conveyance to the municipality for the land for which the damages are given (§ 10). The bonds are to be paid by an assessment or tax upon the district benefited (§ 13). When all damages are paid and satisfied, the Board are to remove the buildings upon the street and widen the same (§ 17). Then follows the all-important Section 22, in these words:

"*The completion of the work described in this Act shall be deemed an absolute acceptance by the owners of all lands affected by this Act, and by their successors in interest, of the lie*

*created by this Act upon the several lots affected. * * * This shall be regarded as a contract between said owners and the holders of said bonds."*

The present action is brought by *all* the owners of land affected by the Act, to enjoin the enforcement of the lien created by the Act upon their property. The averments of their complaint are as follows:

The "order and decree of said County Court, approving and confirming said report (of the Board of Commissioners) recites specifically that every step required by said Act was taken by said Board of Supervisors, by said Board of Dupont Street Commissioners, and by said Court, and *said proceedings all appear to be regular on their face* and make a *prima facie* lien on all the said estate and lands."

The complainants, however, attack these proceedings for alleged secret vices, not disclosed upon the face of the record of the proceedings, and discoverable only by an investigation *in pais*. These alleged defects are that: 1, the ordinance of the Board of Supervisors (§ 21 of the Act) was not published in the manner provided by law; 2, the notice required to be given by the Board of Commissioners of their organization (§ 6) and of the completion of their report (§ 7) were not published as required by law—the only objections against the publication being that they took place, at times, in the supplement, instead of the body of the paper; 3, the Board of Commissioners were guilty of misconduct and fraud in making their report; 4, the report of the Commissioners, as

finally confirmed, shows that the damages of the improvement exceed the benefits.

If we add to these the claim that the statute is unconstitutional, we shall have before us all the objections urged by the plaintiffs; and, as to the unconstitutionality of the Act, it is clear that since the late decision in *People* vs. *Bartlett*, 6 W. C. R., that claim cannot successfully be urged.

It is admitted that the work described in the Act has been completed. Finding XXXVI of the Court is in these words:

"That after the said confirmation by the said County Court and during the first seven months of the year 1877, the said Dupont Street between Market and Bush Streets, was actually widened on the ground from an original width of forty-four feet, to a width of seventy-four feet, measuring westerly from the original and present east line of said Dupont Street, by the removal of the buildings thereon, and the turning of the same into a roadway and sidewalk; and during the first seven months of the year 1877, the buildings and improvements on the west side of said Dupont Street, taken from said Market to Bush Street, were made to conform to the new line of the said street as widened thirty feet, and so still remain; and said thirty feet has since the month of July, A. D. 1877, been devoted to the uses and purposes of a public street, and has been used and is still used as such by the public at large."

This action was commenced on the 4th of April, 1879, two years and three months after the work of actually widening the street had been commenced, and two years less four months after it had been completed.

The plaintiffs do not deny full knowledge of all

that was done under and in pursuance of the Statute. They do deny knowledge of the alleged secret frauds and misconduct of the Board. (§ XX of Complaint.) But, that they knew that the Board of Supervision had passed an ordinance; that the Board of Commissioners had given published notice that they were organized; that the Board had made their report, and left it in their office for public inspection for thirty days; that they had given published notice that the report was so open for inspection; that the report had been presented to the County Court, and by it confirmed; that one million of bonds had been issued and sold, and the proceeds applied to the payment of the damages awarded; that deeds of conveyance had been executed to the municipality for the land taken for the widening of the street; that the buildings along the whole west line of the street had been removed and torn down during a period of seven months, and then the street widened and made a public street—these things and the knowledge of these things the plaintiffs do not deny. Indeed they could not, without perjury, deny them, for, one of these very plaintiffs—L. Carniveau—appeared before the County Court and, upon objections made to the report of the Commissioners, obtained a reduction of assessment. (Trans., pp. 316, 317.)

Years after all this had been done, *all* the parties affected by the widening of this street (p. 409), including those who have made voluntary conveyances to the City, and have received from the proceeds of the bonds tens and hundreds of thousands of dollars, upon an award to them of damages, all these parties unite in an attempt to repudiate the payment of these bonds, to evade the tax imposed, and to invoke the aid of a Court of Equity to enjoin its collection.

Such an attempt, with all its attendant dishonesty, was foreseen by the framers of this law; and they set their face against it; and, by anticipation, legislated it down. They made the accomplishment of such a nefarious purpose a legal impossibility by providing, in the twenty-second section of the Act, that the completion of the work described in the Act—the conferring upon the property of the benefits contemplated by the law—should be deemed by the property owners an acceptance of the burdens imposed by the Act.

If I understand aright the meaning of this provision, it creates an absolute estoppel upon the property owners by which they are forbidden to contend that all things provided by law necessary to the legality of the proceedings were not done.

This introduces no new principle, but simply crystalizes in the shape of an express statutory provision, a rule of universal application in the ad-

ministration of justice, which finds expression in the old maxims—"*Qui sentit commodum sentire debet et onus;*" "*qui tacet concentire videtur ubi tractatur de ejus commodo.*"

These principles have been of constant application in cases of this character :

In *Weber* vs. *City of San Francisco*, 1 Cal. 455, an assessment was laid on certain property benefited by a street improvement, which had been inaugurated by an ordinance of the Common Council. *After the work had been completed*, plaintiff brought suit in equity to enjoin the collection of the assessment, claiming that it was unauthorized and invalid for various reasons—among others, the insufficiency of the ordinance.

The Court, there laying down in clear and terse language the doctrine for which I contend, said :

"An assessment was laid for the purpose of improving a street, and thereby benefiting the property of the plaintiff in common with the property of the persons owning lots on the same street. *The work has been completed; and after the plaintiff has derived all the benefit and profit therefrom, and after the contractors with the city have expended their labor and money to improve the plaintiff's lots, he comes into Court, when he is called upon to pay his proportion of the expense, and asks, in effect, that he may be exempted from the general burden, imposed for the common benefit of himself and others, on the ground that there are some irregularities in the mode of making the assessments. I think that should not be permitted.* The plaintiff asks for the equitable interposition of the Court to prevent a sale of his land by the defendants; but every

principle of equity and justice demands that the plantiff should pay, and it is one of the first maxims of jurisprudence, that 'he who asks equity, must do equity' * * Had the plaintiff instituted proceedings before the work was commenced, and enjoined the city from making the improvement, I should have felt it necessary to inquire into the validity of the ordinance, by virtue of which the assessment was made and sale ordered, and into the powers of the Common Council, under the Charter, to make the assessment in the way they did make it. *As the case now comes up, I do not deem this inquiry necessary.*"

In *Patterson* vs. *Baumer*, 43 Iowa, 477, 482—an action to restrain the collection of taxes levied upon certain lands to pay for the construction of a ditch, it was insisted that there were many illegal acts of the county authorities in laying out the ditch which invalidated the assessment.

The Court said: "While the work of constructing the ditch was undertaken, because demanded by the public interests, yet the petitioners being land owners in the vicinity of the improvement, were interested therein. *They must all be presumed to have had notice of the action of the county in ordering the work, and in causing it to be prosecuted. Some of them signed the petition to the Supervisors, asking that the work be done. They cannot be presumed to have been ignorant of any irregularities up to and including the letting of the contract.* They should have objected thereto before the expenditure of money and labor by the County and contractor. *The law will not permit them to remain silent until after the work is done, and then raise such objections to defeat the collection of taxes.*"

Where a person obstructed a street, claiming that the Act under which it was opened, was un-

constitutional, the Supreme Court of Pensylvania —*Pittsburg* vs. *Scott*, 1 Barr., 309, 357, said:

"The defendant stood by and saw the city, without a whisper of objection on his part, make large expenditures and valuable improvements, not only to the street, but to the landings, to which he now asserts title. His objections are, therefore, neither supported by law, nor has he any equity to favor his pretensions."

"'Upon what principle of exalted equity,' asks the Supreme Court of Kentucky, in *Ferguson* vs. *Landram*, 5 Bush., 230, 'shall a man be permitted to receive a valuable consideration through a statute procured by his own consent, or subsequently sanctioned by him *or from which he derives an interest and consideration*, and then keep the consideration and repudiate the statute as unconstitutional? * * * These men must return the consideration they have voluntarily received, before they shall be heard to assail the action and statutes by which they have received it.'"

Where certain swamp lands were drained and the plaintiff—in *Kellogg* vs. *Ely*, 15 Ohio St., 64, 67—claimed immunity from an assessment for the cost *on the ground that the proceedings under the statute were defective*, the Supreme Court of Ohio answered:

"When the different sections of the ditch were let to the lowest bidder and when the first spade had been thrust into the earth in the execution of the contract then made, before the contractors had expended any money or the laborers any sweat, then, if ever, the remedy by injunction was open to the plaintiff below. But he did not invoke it. It does not appear by the record that he ever warned the contractors or laborers that he intended for himself to resist the collection of the assessment, which must follow to raise the money to pay them; but, remaining inactive and silent until his swamp lands were drained by a ditch nearly a mile in length, he then, for the first time, asked the interpsition of a Court of Equity. We think he comes too late."

In *Wiggin* vs. *Mayor & Co.*, of New York, 9 Paige, 16, 24. Chancellor Walworth said:

"The proceedings for making the improvement were commenced nearly five years since, and *the complainant has waited until the improvement had actually been completed several months before he or his agent had attempted to interfere. His property has received the full benefit that it could receive from the improvement*, which benefit the commissioners have estimated at several thousand dollars. And as property of other persons to a very large amount has been destroyed for that purpose, *justice requires that it should be paid for by those who have been benefited by the improvement rather than by a general tax upon the city at large.* A Court of Equity, therefore, at this late day, will not interfere with its strong arm to cast the burden of the improvement from those who have been benefited thereby and upon those who have not."

In the case of *State* vs. *The Mayor, &c.*, 40 N. J. L., 244—a case of assessment for the grading and curbing of an avenue—the Court said:

"The main reasons assigned (for setting aside the assessment) are (1.) That the grading was done and altered *without the consent of a majority of the property-owners;* (2.) that the alteration was made without payment to the owners of buildings on that section of the avenue of the damages thereby sustained; (3.) that the grading was done *without the two weeks notice of intention in two newspapers, as required by the Charter;* (4.) that the ordinance was passed *without like notice;* (5.) that the ordinance was not regularly passed; (6.) that the ordinance was not duly certified; (7.) that the ordinance was not passed by a two-thirds vote, as required for the expenditure of money; (8.) *that the ordinance was not published as required, between the second and third reading;* (9.) nor published after passage of the ordinance. * * * * * It is admitted, in behalf of the City of Paterson, that there have been irregularities in these proceedings, and it is also conceded that if the prosecutors had acted promptly, the defects are such that the

grading and curbing of this avenue could have been stopped. But it is also contended that the prosecutors had actual notice of these improvements before they were made and during their progress; that, with this knowledge, they permitted the work to go on to completion; and, after the city had expended and actually paid the whole cost thereof, now refuse to pay their respective assessments, because of these preliminary defects. All the proofs in the case show that they had such notice, and there is no denial on their part. They were not in a position to be silent if the city was acting with a misapprehension of its right, and under color of authority given it by the Charter to grade, pave and curb the streets. *The first work done upon the land of each, or affecting it, with their knowledge, was notice to them that the city authorities were there with a claim of right to make a public improvement, and if they neglected to make the proper inquiries, or to object, with an assertion of their rights as land-owners, until the work was done and paid for, such conduct is a waiver of all objections to the right to make such improvement.* This has become the settled law in our State, relating to such improvements. * * * After such acquiescence in the acts of the city officers, and delay in enforcing their legal remedy, the objections that may be made by land-owners affected by the improvements must relate only to the apportionment and amount of assessment made upon them for the damages and benefits resulting from such improvements."

In *The People* vs. *The Common Council*, 65 Barb., 9, 21, a certiorari to review the proceedings of the Common Council of Utica, in ordering the pavement of a street, the Court said:

"At the close of the present term of this Court, upwards of two years will have elapsed since the first proceedings required by the Charter to authorize the making of the said improvement were initiated by the Common Council, and two years—within sixty days—since the final ordinance for the construction of said work and the acceptance of the proposals therefor were passed. * * *The proceedings must have been well known to the relator and to the other property-owners in Genesee street, in whose behalf*

the writ of certiorari issued in this case. * * * In the meantime (between the presentation and action upon the petition and the issuance of the certiorari) *the work of said improvement had been constructed and completed*, and an assessment for the expense thereof duly made and confirmed, and the assessment roll delivered to the Treasurer of the City for collection, and more than one-half of the amount thereof duly paid to him thereupon. * * * *If any irregularities or any informalities occurred in the proceedings of the Common Council, in directing said work, or letting the contract for its construction, we are of the opinion that after the lapse of the time that has intervened since the said work was authorized, it would be unjust and unreasonable to review said proceedings with the view to reverse them for any such error.* The relator and those in whose behalf, as well as his, the writ was sued out, *have lain by and seen the work constructed upon their street, for the benefit of their property, and should be estopped from questioning the right of the city to make such improvement*, in analogy to the rule in equity, that when a party lays by and sees another make valuable erections and improvements on his land, supposing he is making them upon his own land, he shall be estopped from afterwards setting up his title to the land so improved. The Common Council are, in principle and in fact, nothing more than agents of the property-owners in cities, in making such improvements, and *when the property-owners benefited thereby suffer the improvements to proceed and be completed, they should be held to affirm the acts of their agents in constructing such work.* As in other cases between principal and agent, where the trustees of public or private corporations act for the benefit of particular individuals, such individuals, if they seek to disaffirm and avoid such acts, should take prompt steps to do so, or they will be held to have affirmed the same."

The case of the *State* vs. *Wertzel*, 62 Wis., 184, 186, was an action to recover a statutory penalty for encroachment on a highway. As a defense, the existence of the highway way denied. The Court said :

"We think the defendant is not in a position to attack the validity of the order laying out the highway. * * * The acts of defendants grantor bind the defendant. Such grantor acquiesced in the order laying the highway, and erected his fence on what he supposed to be the east line thereof. *It does not appear that either the defendant or his grantor ever questioned the validity of the order until this action was brought, but always theretofore acquiesced in it as a valid order. To allow the defendant now, for the first time, to assert its validity might work great injustice to the town. * * * These owners have stood by and allowed the town to expend large sums in making the highway and building bridges thereon, without raising any question of the validity of the order laying it out. Under these circumstances we think the defendant and his grantor have acquiesced in the validity of the highway altogether too long to be now heard to dispute it.* We conclude therefor, that the learned Circuit Judge ruled correctly in holding that the order * * * *was ruled and established a legal highway.*"

In *Quinlan* vs. *Myers*, 29 Ohio St., 500, 511, an action to enjoin the collection of an assessment for the improvement of a road on the ground that the petition therefor had not been signed by a majority of the residents and land-owners, it was urged as a defense that the plaintiff had not applied for the injunction till the work was almost completed, and that he was thereby estopped.

Said the Court: "Myers, (the plaintiff,) had an election either to abide by and acquiesce in the report of the reviewers (for laying out the road,) or to institute legal proceedings to set it aside. *He elected to acquiesce.* The improvement was let to contract, and the contractors commenced work upon it in August, 1867, of which Myers had notice again; he had an election either to commence proceedings to enjoin work upon the improvement or to acquiesce in what was being done. He chose the latter. The work was suspended from September, 1867, till April, 1870; * * * when the contractors

again commenced work on the improvement of which Myers had notice, and again he elected to let the work progress without objection on his part. The work was substantially completed in the year 1870; work of the value of about $1000 only remaining undone. *After the work was thus substantially completed, and the benefits of the improvement thus obtained, Myers for the first time, on the 29th of May, 1871, made application for an injunction, not to restrain the Commissioners or the contractors from making the improvement, but to restain the Auditor and Treasurer from collecting the assessments to pay for the improvement after it was made.*

"In equity, wherever the rights of other parties have intervened by reason of a man's conduct or acquiesence in a state of things about which he has an election, and his conduct or acquiescence, or even laches, was based on a knowledge of the facts, he will be deemed to have made an effectual election; and he will not be permitted to disturb the state of things, whatever may have been his rights at first. Bigelow on Estoppel, 508, 33 Iowa, 278.

"Here Myers had acquiesced for nearly five years, during which time, and it might be said by reason of such acquiescence, the rights of contractors and sub-contractors to be reimbursed for labor and materials employed in making an improvement beneficial to the plaintiff had intervened, or the county had become bound for the same by issuing its bonds to the contractors. * * * The principal ground upon which Myers relies for an injunction is, that the Commissioners had not jurisdiction to make the order for the improvement. *After an acquiscence of nearly five years, during which the work was substantially completed. On every consideration of justice and equity, Myers ought now to be estopped from denying his liability to pay his assessments for the completed improvement, and this, without reference to whether the Commissioners had jurisdiction to order the improvement or not.* * * *

"There is nothing shown in the record that shields Myers from the consequences of his election and long acquiescence in what was being done toward the construction of the improvement, and we find that he is now *estopped from denying his liability to pay the assessments in question.*"

In the *State* vs. *The Mayor*, 36 N. J. L., 158,

a certiorari to review an assessment of expenses for grading Fulton Street in the City of Paterson, an the ground, among others, that the ordinance authorizing the improvement was invalid, not being preceded by the public notice prescribed by law, the Court said :

"*Although we cannot avoid the conclusion that * * * the prosecutors are sustained in their insistment as to the want of notice, we are satisfied that they are not now in a position to take advantage of it.*

"There can be little doubt that they were aware, almost from the first, of the inception and progress of the proceedings now before us. One of them had joined in a petition for the grading of Fulton Street, as early as July, 1869. It is true that this street was subsequently vacated and relaid. But long after this, May 2nd, 1870, the prosecutor referred to, Mr. Woodruff sent to the Board of Aldermen a second petition relating to the proposed improvement. This was about a month after the completion of the work for which the assessment in question was made. The Commissioners finished the assessnent and made their report May 21st, 1870, and the writs in these cases were not issued until July 8th, 1870.

"*However fatal the objection now unde rconsideration might have been if promptly acted upon, it cannot be allowed to prevail after so much delay, and especially after the improvement has been completed and paid for by the city.*"

In *City of New Haven* vs. *Fair Haven*, 38 Conn., 422, 432, an action to recover an assessment for a street improvement, which was resisted on the ground that the corporation defendant was, under its charter, exempt from the operation of the assessment in question, it was held that it had precluded itself from raising this objection by its

standing by, without complaint, and acquiescing in the work of improvement as it progressed.

Said the Court:

"It is a very interesting and important question whether the defendant, by objecting to these proceedings at the commencement, could have practically defeated the whole improvement; but the case before us does not require us to decide that question. *The defendant suffered the city to go forward and incur the expense, with full knowledge of the proceeding, and without objection at the time. The defendant must have known that the improvement would largely benefit it in the matter of repairs, that the proceeding was under the statute, and consequently at the expense, in part at least, of the parties benefited.* There was no reason to suppose that the city was doing the work of the defendants at its own expense, or at the expense of other parties. *The presumption, therefore, is, in the absence of any finding to the contrary, not only that the defendant consented to the making of the improvement by the city, but that there was an implied understanding that the defendant was to bear its fair proportion of the expense. We think, therefore, that the defendant should be estopped from setting up this claim.*"

In *Stevens* vs. *Franklin County*, 48 Mo., 167, 176, an action to restrain the collection of an assessment for the payment of bonds issued by the defendant to enable the improvement of a certain road, and to restrain the payment of such bonds, the plaintiff was held estopped by his acquiescence in the improvement to question the regularity of the proceedings.

The Court said:

"The application on the part of the appellants would have come with a better grace and with more persuasive equity, had they filed their bill at the commencement of the work, and not waited till its completion before they moved in the matter.

They were citizens of the county, they knew of the contract, they saw the heavy expenditures that were being made, and the amount of improvement as it was executed; and still the proceeding was not instituted till the work was completed, and the bonds in payment were issued and nearly all negotiated."

Skinner vs. *Hartford Bridge Co.*, 29 Conn. 523, 535, was an action to recover damages for the raising of a causeway. The Legislature had authorized the defendant to build the causeway in question through certain meadows, and provided for a committee to assess the damages resulting therefrom to the land proprietors. The assessment was made and the damages paid to the proprietors, among others, the plaintiff. The action was not brought till many years thereafter, during which time the causeway had been treated and used by the public, without objection, as a public highway.

Said the Court :

"We think it now quite too late, if it ever could have been done, to call in question the legality of the laying out of the causeway, upon the ground that the act providing for the assessment of damages which was essential to the legality of the proceeding, had not taken effect by the rising of the General Assembly at the time when the assessment was made. * * * The damages, whether legally, assessed or not, were in fact assessed in favor of the plaintiff's grantor, and were accepted by him as damages for the land taken ; and the causeway thus laid out and paid for has been ever since treated and held, without objection from any quarter, as a public highway. In these circumstances the plaintiff is clearly estopped from calling in question the validity of the proceedings under which the causeway was laid out and the damages assessed and paid. The

doctrine of estoppel has often been before the Court, and has been applied by us in cases presenting defects and irregularities more serious and questionable than any suggested in this case."

New Haven vs. *Town of Chatham*, 42 Conn., 465, was an application for a mandamus to compel a town to guarantee certain bonds which had been executed by the plaintiff railroad company, and which it (said town) passed a vote to guarantee on the completion of the road. The town defended on the ground that the vote was not regularly passed. The vote had in fact taken place by division of the house, and not by ballot, as required by law, but neither the officers nor the inhabitants of the town gave any notice that it was not taken by ballot until more than three years thereafter, and until long after the railroad company had in good faith, and with the knowledge of the inhabitants, issued the bonds that were to be guaranteed and delivered them to the contractors, who had performed the work, furnished materials and expended money in reliance upon them. *Held:* The town and its inhabitants were estopped from setting up the invalidity in the vote.

The Court, at pp. 478 and 479, said:

"Its (the town's) officers and inhabitants knew that the company and the contractors under it, relying upon the vote of the town, and upon the record thereof, as evidence that it was legally passed, were expending large sums of money and incurring obligations in completing the road, and adding substantial value to the property in which the town had made large previous in-

vestments, and that the work of construction was carried on wholly upon this pledged assistance from Chatham and other towns in like situation. When asked, from time to time, to place the guaranty upon the bonds by the company, and by the contractors, whom they had seen expending money and performing labor upon the faith of their record, they received the request in silence or refused compliance for varying reasons, *but no officer or individual citizen ever gave any notice or even intimation to the company or any person that there was any defect or informality in the manner of passing the vote, or any error in the record thereof, until the road had been completed and they had derived all possible benefits from silence.*

"And the town having made the record for the express purpose and with the design hereinbefore indicated, its officers and inhabitants all having knowledge that the company and the contractors did in fact understand it as importing a vote by ballot, and upon such understanding were expending money and labor, in increasing the value of the property of the town, having refrained for more than three years from any effort to correct what they now insist is an erroneous record, and having during the same time neglected to give any notice of a defect in the manner of taking the vote, knowing that such notice would stop such expenditure, *they are now, upon the plainest principles of law, estopped, both as a municipal corporation and as individuals,* from setting up against the company, which still has an interest in the bonds thus delivered to the contractors, and is now seeking to secure the guaranty which it agreed they should have, or against the contractors, any defect in the mode of exercising the power conferred upon them by the Legislature, and from altering a record made by themselves and allowed to stand for three years, by which, with their knowledge, the company and the contractors were induced to believe in the existence of a certain state of things, and so act on that belief as to alter respectively their previous positions.

"Indeed, the votes, the record, and the subsequent conduct of the town and its inhabitants in reference thereto, considered in relation to the bonds, subject them to the operation of the law of estoppel as completely as if the town had become the makers of the bond, and had declared in it that it had complied

with all the requirements of the law in issuing it and had allowed it to pass into the hands of an innocent holder. When the Legislative grant of power to the town to bind itself, and a declaration of this character concerning the manner of exercising it, co-exist, Courts apply the principles of estoppel as strictly and with as much reason to municipalities and their inhabitants as to individuals."

In *Society for Savings* vs. *New London*, 29 Conn., 174, 191, *et seq.*, an action to recover interest on certain city bonds, issued to aid in the construction of a railroad, and the payment of which was resisted by the city, on the ground of irregularities and the want of authority in their issuance, the Court said:

"The proceedings of the city in issuing the bonds were well known to all the citizens. We must consider them as conversant with the votes of April 14th and July 31st, and everything that was done under the votes; the issuing of the bonds in the name of the city; the delivery of them to New London, Willimantic and Palmer Railroad Company for their use; the advertisement of them in the public papers, and the fact that they were bought by honest purchasers, from time to time, for the ultimate benefit of the citizens themselves. They knew, too, that the bonds were taken by the Treasurer of the State as securities for the issue of bank paper. *If all this was without authority, why, we ask, did not the citizens then make their objections? Why did they not enjoin the city agents from further proceedings? At least, why did they not give notice to the public, and put purchasers on their guard, when they knew that a grievous loss must ensue if the bonds were unauthorized? We must believe that, after such acquiescence, it would be an outrage upon morality and justice and an impeachment of the integrity of the citizens of New London to allow the city to repudiate its obligations for such a cause.* Many of the citizens, we well know, disapprove of and condemn such a repudiation; and we trust all of them would do so

were it a simple transaction between man and man, where the culpability could not be thrown off upon a municipal corporation. But it is this very circumstance which enhances the impropriety of the act of repudiation; for the integrity of a public body is its principal virtue. To violate or impair this is to undermine government itself, and to destroy the very institutions of the civil State. Such repudiation cannot receive the countenance of this Court of justice. Hitherto repudiation has not anywhere been countenanced among us, and we trust it would not have received favor in this instance with any of the citizens of New London had they carefully considered the conequences of the act, and the precedent they were establishing for other and less favored communities. The general doctrine of equitable estoppel, especially as to taxpayers, is most ably discussed and approved in the cases of *The State* vs. *Van Horne*, 7 Ohio St. 327; *Knox County Commissioners* vs. *Aspinwall*, 21 Howard, 539; *Tash* vs. *Adams*, 10 Cush., 252; *Graham* vs. *Maddox*, 6 Am. Law Reg., 595, 618, and *Gould* vs. *Venice*, 29 Barb., 442.

"Perhaps no one thing has done more to disparage the fair fame of our country abroad, or to impair the integrity of our institutions at home, than the loose sentiments which prevail in some parts of the land as to public and corporate indebtedness. It seems to be thought by some people that as to obligations of this character, nothing more is called for from the debtor than what is agreeable, easy and convenient. Honor, honesty and punctuality are thought to be quite foreign to the subject. But this is a very great mistake, false and ruinous in the extreme. These virtues are as essential to public bodies as to individuals, and the nation, State, City or municipality that does not observe and cherish them has upon it a blight, which will, in the end, destroy its best interests.

"It was said on the argument that, however proper it might be to compel the City of New London to fulfill her engagements, if the city as such was alone affected, yet that individual citizens, *taxpayers*, have rights of their own, which they may defend in the name of the corporate body. But we can recognize no such independent character in the citizen. Besides, the city alone appears here to defend; and if the individual citizens

were to be considered as appearing for themselves, they could only defend in the name and according to the rights of the city."

If the Court desires, it may consult the following additional authorities in this connection:

Stasser vs. *Fort Mayne*, 100 Ind., 443.

Ricketts vs. *Spraker*, 77 Ind., 371, 381.

Baltimore vs. *Strauss*, 37 Md., 237, 243.

Whittlesey vs. *The Hartford R. R. Co.*, 23 Conn. 421, 432 et seq.

Hitchcock vs. *Danbury*, 25 Conn., 515.

Erie Ry Co. vs. *Delaware &c. Co.*, 21 N. J. Eq., 283, 289.

Mahaska vs. *Des Moines*, 28 Iowa, 437, 454.

Goodin vs. *Cincinnati*, 18 Ohio, St. 169, 180.

Motz vs. *City of Detroit*, 18 Mich. 495, 528.

City of Burlington vs. *Gilbert*, 31 Iowa, 356, 365.

Commonwealth vs. *City of Pittsburg*, 43 Pa St., 391.

Bidwell vs. *City of Pittsburg*, 85 Pa. St., 412.

Tash vs. *Adams*, 10 Cush., 252.

Matter of Application of Cooper, 93 N. Y., 507.

Daniels vs. *Tearney*, 102 U. S., 415, 420.

Matter of Application of Woolsey, 95 N. Y., 144.

City of Lafayette vs. *Fowler*, 34 Ind., 140, 146.

Hellenkamp vs. *City of Lafayette*, 30 Ind., 182, 194.

The principles enunciated in these cases are the dictates of common honesty, the offsprings of elementary justice. They are not of to-day, but of all time; not of this country, but of all countries. They have been proclaimed by judges in all ages and in all climes, and still flourish wherever trickery is discountenanced and dishonesty condemned. The Legislature foresaw that these fundamental rules of jurisprudence might be ignored; they anticipated that, upon the line of this street there might be men, of such elastic consciences as to be willing to permit this great public improvement, by which their property was to be vastly enhanced in value, to proceed, through all its stages to completion, and then, when the benefits had been fully and irrevocably conferred, to attempt to evade the payment of the debt contracted on their behalf; they apprehended that there might be men so lost to all sense of shame as to be willing to convey their property to the municipality, to receive in payment money raised by a sale of the City's bonds, and then, when assessed to pay these obligations, incurred in their behalf, while still retaining the money paid them and the benefits conferred, to repudiate the validity and obligation of the bonds. The Legislature foresaw all this, and to prevent the accomplishment—in the hope of

forestalling even the attempt--of such nefarious proceedings, it transferred to the Statute the rule that the completion of the work should estop all parties anywhere and everywhere, in law as well as equity, from denying the legality of the burdens imposed by the Act.

What is the meaning of this provision? Plainly this: The law says to the property owners: Here is a public Statute, of which you all take notice, and whose provisions are known to you; under it a great public improvement for the benefit of your property is about to be inaugurated; it is contemplated and provided that the cost of this improvement shall be borne by the parties who reap its advantages; various steps are to be taken before the improvement is completed; the Westerly line of a whole street is to be changed, and rows of buildings for several blocks to be torn down these things will go on at your own doors and under your own eyes; the proceedings are complicated and, through carelessness of officials, may be attended with some irregularities; if you wish to take advantage of these irregularities, do so while the proceedings are going on; but, if you permit them to go on without complaint, if you allow them without objection to reach completion, you shall be deemed to acquiesce in the provisions of the Act and the regularity of the proceedings had under it; and, having voluntarily seen the

benefits of the law conferred upon your property, you shall be held to have assented to its burdens.

Is there anything to prevent the Legislature from declaring by Statute this rule of estoppel? Nothing that I can imagine. Courts declare what acts estop parties from questioning certain things done with their acquiescence. Why may not the Legislature declare the same, and, by public Statute, warn and inform parties that their tacit acquiescence in certain proceedings, their failure to challenge or oppose them while they are *in fieri* under their own eyes, will estop them from questioning them when they have reached completion? Why may not the Legislature make it known to parties that, if they voluntarily accept the benefits conferred upon them by a Statute, they shall not be permitted to avoid the corresponding burdens?

This provision of the Statute is in consonance with the numerous decisions which I have cited upon the question of estoppel. It is eminently just. It ought to be enforced, unless it contravenes some provision of the Constitution; and, there is no constitutional provision opposed to it.

Precisely similar statutory estoppels have been recognized and enforced by the Courts. Thus:

In *Palmer* vs. *Stumph*, 29 Ind., 329, the Statute under consideration, (the Indiana Act for the incorporation of Cities) provided, that the Common Council might, upon petition of two-thirds of the

abutting owners, cause improvements to be made in streets, by executing contracts therefor to the lowest bidder, after advertising for proposals, and that the contractor should be paid at the completion or during the prosecution of the work by assessments to the levied on the owners benefited. The 68th section provides for the collection of the assessment through the agency of a precept issued for that purpose, and further makes provision for an appeal from the precept to the Court of Common Pleas, declaring however, that "no question or act shall be tried which may arise prior to the making of the contract for said improvement."

The Court commenting on this Act, said:

"*The plain intent of all the Statute is to prevent the owner of property to be benefited by a contemplated improvement made by the Common Council of the street in front of his property from remaining silent until he has secured the full benefit of the work, and then avoiding the payment therefor. If he denies the power of the Council to order the improvement, he must test the question by injunction before the work is done.* ACQUIESCENCE IN THE ACTION OF THE COUNCIL IS BY LAW MADE TO ESTOP HIM FROM GOING BEHIND THE MAKING OF THE CONTRACT."

The same statute came under consideration in *Commissioners of Allen County* vs. *Silvers*, 22 Ind., 491, where it was objected on appeal, that it no where appeared in the record, that two-thirds of the resident lot-owners had petitioned the council for the improvement. Said the Court at page 499:

"These are questions which the Court below could not inquire into. We have seen that on the appeal no questions of fact

could be tried which arose before the making of the contract. This provision of the statute was inserted for a purpose. *That purpose was undoubtedly to enable the contractor to collect his money when he had done the work contracted for, without being harassed with questions as to the regularity of the proceedings that took place before he entered into the contract, and to which proceedings he might be a stranger.* If a party interested have reason to believe the proceedings, before the contract, were irregular or insufficient to authorize the contract and the doing of the work, he may enjoin them before the work is done; but *if he withholds his objection until the work is done there is no hardship in precluding him from going behind the contract and showing that by reason of any fact it was unauthorized, * * * whether the petition was signed by the requisite number of residents of the city, owning property bordering on the street on which the improvement was to be made, was a fact that could not be inquired into.*"

The provisions of this same statute, were likewise given effect, and thus its validity recognized, in *City of Indianapolis* vs. *Imberry*, 17 Ind., 175.

It is humbly submitted that the principles of these decisions and the express language of the statute dispose of the plaintiff's contention, and that the plaintiff's case ends right here.

Secondly.—If it should be held that this view of the statute is incorrect, still, I maintain that, unless this Court is prepared to overrule one of its former decisions, upon all objections urged here against the legality of the proceedings had under the Dupont Street Act all discussion is foreclosed, and every point is set at rest, upon authority in this State, and squarely decided against the plaintiff's contention by the

case of *San Francisco* vs. *Certain Real Estate*, 42 Cal., 512.

This case is of such importance that a somewhat extended examination of it is warranted.

By statute of March 30th, 1886, [Stat. 1867–8, p. 549,] commonly known as the Second Street Cut Act, it was provided as follows:

§ 1. The Board of Supervisors are *authorized* to modify the grade of Second Street

§ 4. The expense of the work is to be defrayed by assessment upon the owners of lands "that may be benefited."

§ 4. *The district benefited is defined and described.*

§ 8. The Board of Supervisoors "appoint three disinterested citizens * * * as Commissioners to assess the benefits and damages to each separate lot of land within the limits of the district."

§ 11. The Commissioners assess the damages upon the lands benefited "as near as may be in proportion to the benefit, which shall be deemed to accrue to each lot respectively,"

By statute of February 1, 1870 [Stat. 1869–70, p. 41], amendatory of the foregoing, it is provided as follows:

§ 12. The Commissioners file their report in the office of the Clerk of the County Court.

"*The Clerk of said County Court, as soon as said report shall be filed in his office, shall give notice of such filing by publishing a notice thereof in the official newspaper of said Board of Supervisors for a period of five days.*"

§13. "*Within twenty days after the publication of said last mentioned notice, any interested party or parties dissatisfied with the report of said Commissioners, or any part thereof, may file with the Clerk of the County Court of said City and County, written objections to said report, or any part thereof, setting forth his or their grounds of objection.*"

If no such objection is made the report becomes final.

In case of objections, the County Court "shall assign a day for the hearing and trial of said objections, and, on the day assigned * * * said Court shall hear the allegation of the party or parties so objecting, and shall take proof in support of and against said objections, and of said report and the assessment therein, and shall confirm said report, or may modify the same, or may set the same aside, either in whole or in part, or, in its discretion, may refer the matter back to the same Commissioners with instructions, who shall thereupon proceed as hereinbefore provided, or according to said instructions."

Upon coming in of the second report the same proceedings are gone through with.

After judgment of the County Court confirming the report, this action was brought to recover an assessment. An examination of the briefs on file will show that the points of appellant were substantially the same as those of the plaintiffs here. In overruling them the Court said [pp. 519, 520]:

"The amendatory act of February first provides that the report shall be returned into the County Court, of which fact notice was to be given by publication, after which a reasonable time is allowed by the act within which all persons interested were permitted to file objections to the report, and to call witnesses in support thereof. A sufficient opportunity, after due notice, was thus afforded to all persons to attack the report and the proceedings of the Commissioners for irregularity, or for any other just cause; and after hearing all the proofs and allegations of the parties, it was made the duty of the Court to modify or confirm the report. In case the report was set aside and a new report was ordered to be made, a like opportunity was afforded for filing objections thereto and calling witnesses in support of them. After hearing the objections to the second report, it was made the duty of the Court to render a judgment, either confirming or setting aside the report; and the statute declares that this judgment 'shall be final and conclusive.' In the case of Houghton's appeal from this judgment, decided at the last term, we held the judgment to be final and conclusive in such a sense

that no appeal would lie therefrom. It was obviously the intention of the Legislature that all objections to the report, founded upon the errors, misconduct, irregularities, or omissions of the Commissioners, should be heard and determined by the County Court, and should not thereafter be open to attack in a collateral action. The parties in interest were allowed their day in Court, after due notice, with a sufficient opportunity to be heard in their defense, and the proceeding would be interminable if the report could be collaterally attacked after a final judgment in the County Court. This is precisely what is attempted to be done by the defense in this action. To permit such a defense would be to disregard the manifest intention of the statute, and to nullify some of its provisions. The answer, in my opinion, presented no defense to the action."

This case, then, decides these essential points:

1st. It is not necessary that the property-owners should have a hearing before the Commissioners in the first instance; it is sufficient if they are afforded a hearing before the assessment becomes final—by this they are "allowed their day in Court."

2d. It is not necessary that notice of the hearing should be given to the parties in interest personally; it is sufficient that notice by publication be given—this is "due notice."

3d. A notice that the report is filed is sufficient; it is not necessary that the notice should contain anything more than this bare statement.

4th. A publication of such notice for five days in one single newspaper, is sufficient publication.

5th. Allowing twenty days after such publication within which to make objections to the report is the allowance of a sufficient length of time.

6th. The right given by the statute to "*make objections to such report, or any part thereof,*" is a right "*to attack the report and the proceedings of the Commissioners for irregularity, or for any other just cause.*"

7th. Whatever the nature of the objection, no further notice of the proceeding need be given than the five days publication above mentioned,—by this notice "*opportunity * * * was thus afforded to all persons to attack the report.*"

8th. "*All objections to the report, founded upon the error, misconduct, irregularities, or omissions of the Commissioners*" must "*be had and determined by the County Court,*" and can "*not thereafter be open to attack in a collateral action.*"

9th. The judgment of the County Court conclusively establishes the legality and validity of the report—which thenceforth cannot be "*collaterally attacked.*"

10th. To permit such a collateral attack to be made "*would be to disregard the manifest intention of the statute and to nullify some of its provisions.*"

This decision is on all fours with the present case, upon the essential points relied on by the plaintiffs here. It had stood upon the reports of this Court unchallenged and unquestioned for years, at the time the Dupont Street Act was passed. It stands there to this day. Relying upon that solemn ad-

judication in a parallel case, a large number of persons have purchased the bonds issued to defray the expense of a great public improvement in the City of San Francisco. Taught by the doctrine of that case, they had learnt that the judgment of the County Court was a conclusive adjudication of the regularity and legality on the proceedings taken under the Statute. They had been led to believe that that judgment was a shield against the numerous small and vermiculate attacks which are now made upon the proceedings. They still abide in the conviction that this Court will not push aside that shield, and, by overruling its own decision, destroy the investments which parties, in their confidence in the stability of the jurisprudence of the State, have made in these securities. The decision, as to them, has acquired all the dignity and sacredness of a rule of property. As such, even though doubts of its correctness should be entertained—and none have yet been suggested—it should not be shaken now.

I.

The Dupont Street Act is Free from any Constitutional Objection urged against it by the Plaintiff.

I shall contend that the Statute, even under the most rigorous construction, is not obnoxious to criticism. But, if the act needs a more benign interpretation, it may safely be expected that the Court will not refuse it, in examining the action of a co-ordinate branch of the government.

It is the duty of the Court "to adopt that construction which, without doing violence to the fair meaning of the words used, brings the Statute in harmony with the provisions of the constitution; the presumption must be that the Legislature intended to grant such rights as were legitimately within its power."[1]

I. The Act does not Fall within the inhibition of the Doctrine of People vs. Lynch.

The doctrine of that case prohibits the Legislature from entering, as a forcible intruder, into the municipality, to usurp its ordinary functions. "Such a law" says the Court, "is unconstitutional, because it * * * deprives the Board of Trustees or legislative department of the city government * * * of all choice or discretion in reference to the improvement."

[1] Granada County *vs.* Brogdon, 112 U. S., 269.

But, the Dupont Street Act is the exact reverse of this. It leaves it entirely within the power of the legislative department of the city to exercise its own choice or discretion. Far from stepping within the bounds of the municipality as an intruder, the Legislature does not enter at all, until the Board of Supervisors voluntarily unbars the gates.

Surely the Legislature could have amended the charter of the city, by inserting therein a provision that, whenever the Board of Supervisors should deem it expedient to widen a street, and should adopt a resolution to that effect, the Mayor, Auditor and Surveyor should constitute a board for the purpose of making the proposed changes, and should proceed to discharge functions similiar to those imposed upon them by the present Act. The statute before us is, in reality, but an amendment to the charter of the city.

The distinction between the present statute and that under consideration in *People* vs. *Lynch* is too obvious to need further comment

Since the late decision of this Court in *People* vs. *Bartlett*, 6 W. C. R., 765, this question is no longer an open one in this State.

II. The Statute does not Violate the Constitutional Right of a Person to notice of Proceedings which Affect his Property.

It is contended that the parties in interest had a

constitutional right to notice and opportunity to be heard upon the assessment of damages and benefits; and it is claimed that the notice of the hearing was, in several particulars, radically defective.

1. It is said that no notice is given to the parties to appear before the Commissioners while they are making the roll, and before they have completed their labors; that the only notice provided for, is one given after the roll is completed by the Commissioners, and that the parties had a constitutional right to notice and opportunity for a hearing by the Commissioners before they completed their labors.

To this I answer:

The parties had no constitutional right to notice and a hearing before the Commissioners. It is sufficient if they have due notice and opportunity to be heard before some tribunal competent to afford them relief at any time before the proceedings become final against them.

This proposition is universally recognized, and is fully established by the following authorities:

Reclamation District vs. *Evans*, 61 Cal., 104.

That was an action to recover an assessment on certain lands for reclamation purposes. It was urged that the provisions of the Political Code relating to such assessments were unconstitutional, as they did not provide for any mode by which a party assessed should have notice of the proceed-

ing against him and an opportunity to object to the amount charged upon his land.

The Court said: "No assessment against any tract of land can be enforced except by action, to which the owner of the tract must be made a party. * * * It cannot be material, * * * that the landowner had no notice *before* the proportional benefit to his land was estimated by the Commissioners, if, in the subsequent action, he had his day in Court with full opportunity to contest the charge before it was declared a lien upon his land, or a judgment to be collected out of his general property."

City of Stockton vs. *Dahl*, 3 W. C. R., 308.

The Court there had occasion to construe the provisions of the Charter of Stockton relating to assessments for the improvement of streets.

The Charter, [Sec. 27, Ch. 422, Stats. 1871–2, pp. 607–608,] provides, that the City Assessor shall make an assessment for the work done, and prepare an assessment list showing the names of the owners, the description of the property assessed, and the amount of each assessment; which, together with a diagram, he shall file with the City Council, (no provision being made for a hearing before him by the taxpayer.) The City Council shall thereupon give notice of a day on which they shall sit as a board of equalization, and all, or any person directly interested in the assessment, feeling aggrieved by any of the acts or proceedings concerning the assessment, or having or making any objection to the correctness or legality of the same, shall, at such time specially

make known the cause of objection or complaint. Said Board may correct, alter or modify said assessment in such manner as to them may seem just, and may direct the Assessor to alter or correct it, etc.

Said the Court: "The statute * * * gives an appeal to the Council by any person claiming to be aggrieved by the assessment, and authorizes the Council to 'correct, alter or modify' an assessment. We know of no constitutional inhibition upon such legislation."

Matter of De Peyster, 80 N. Y., 565, 572.

This was a motion to vacate an assessment on the lands of petitioner for the construction of a sewer in the City of New York.

"The appellant testifies," said the Court: "That he had no notice that an assessment was to be imposed on him. * * * It is not needed that in this case we decide whether an assessment will be valid, though no notice of any kind is given to the owner of the property, until he is called upon to pay the amount rated against him. That question is not here. The legislature has prescribed for notice before the assessment is final and effectual. Chap. 326, Laws of 1840, § 2, has provided for notice of the completion of the estimate and assessment, to be given to owners or occupants of premises affected. This notice is by publication in daily newspapers for objections in writing to be presented in a time named, which, if not yielded to by the primary board, are to be sent up with the assessment to the reviewing and confirming board." * * * "The opinion in *Stuart* vs. *Palmer*, (74 N. Y., 183,) is not in conflict. That demands only that some notice be given and an opportunity for hearing had, before the assessment becomes conclusive. It says: 'The legislature may prescribe the kind of notice, and the mode in which it shall be given?' We will not reason to the end, that such notice is all that is exacted by the law of the land. Such has been the course

of procedure in such case too long to be now disturbed save by legislative or fundamental provision."

City of St. Louis vs. *Richeson*, 76 Mo., 470.

This was an action to collect an assessment upon certain property benefited by a local improvement. The city charter made no provision for a hearing before the Commissioners, or on the original preceedings in the Circuit Court prior to the levy of the assessment; but by an ordinance it was provided that the City Controller should issue "special tax bills," in accordance with the Commissioners' report, and deliver them to the City Collector, who should give notice by advertisement to all parties interested by name that said bills are in his hands for collection, and would so remain for 60 days, during which time payment might be made, and that all bills remaining unpaid after that period would be enforced by legal proceedings; they being turned over to the City Counselor, who should commence suit thereon in the name of the City.

It was claimed for the plaintiff that "if notice should be held indispensable to a valid exercise of the taxing power, the opportunity for a hearing when sued under the ordinance for the collection of the tax-bill, as in this case, is sufficient notice; that notice and opportunity to be heard *after the assessment* and before the collection, or during the progress of the suit to collect is as

efficacious as if given before, and obviates the objection."

Said the Court, (p. 488): "We do not mean to say that this assessment of benefits is of itself inoperative and without any effect whatever, but what we no mean to hold, is, that while it is valid, as a preliminary inquiry, and while the tax-bill issued thereon, is good as the basis for the suit directed to be issued thereon, yet it does not have and was not intended to have any binding or conclusive effect against the party when thus sued. * * * Whether it would have been better for the charter to have required that this inquiry, (i. e., as to the amount of the charge, etc.,) should have taken place in the original proceedings in the Circuit Court after due notice thereof, or as now provided in this suit, to enforce and collect the tax-bill, was matter for the legislature, and is no concern of ours. We conclude therefore, that it was competent for the defendant in this suit to have set up and mantained by way of answer any good and valid defence they might have, or which they could have presented to the original proceedings in the Circuit Court for the condemnation of said property, and the assessment of said benefits if they had been made parties thereto, and had notice thereof. But the answer actually made by these defendants was that they were not parties to, and had no notice of said original proceeding in the Circuit Court during its pendency, and were not bound thereby. It may be conceded that this answer is true, and yet, if our construction of the charter and ordinance is correct, this answer, * * does not state facts sufficient to constitute a defence to this action. It may be true that they were not parties to the original proceeding during its pendency, and had no notice thereof; yet that fact is wholly immaterial if they are parties hereto duly notified, and can be heard in their defence herein."

The Court cites at length, Cooley on Taxation, pp. 265–266, where it was said: "In tax proceedings, every inhabitant of the State is liable to have a demand established against him on the judgment of others, regarding the sums which he should justly and equitably contribute to the public revenues. Every property owner in the State, whether an inhabitant or

not, is liable to have a lien in like manner established against his property. * * In such proceedings therefore, it must be a matter of the utmost importance that he should have some opportunity to be heard *before the charge is fully established against him.* * * The obligation to make provision for this purpose is recognized by the statutes of the several States. By some, the person assessed is allowed to reduce what he claims to be an excessive assessment by his own oath ; by others, he is allowed an appeal to some board of review, and in all, perhaps, some method is provided by which he may have a hearing *before the assessment becomes fixed and final against him.* * * It is not customary to provide that the taxpayer shall be heard *before the assessment is made*, but a hearing is given afterwards, either before the assessors themselves, or before some court or board of review."

The Court also cites the case of *McMillan* vs. *Anderson*, 95 U. S., 37, where it was held, that "the revenue laws of a State may be in harmony with the fourteenth amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty or property without 'due process of law,' *although they do not provide that a person shall have an opportunity to be present when a tax is assessed against him.*"

Wilson vs. *Karle*, 42 N. J. L., 612, was a case arising out of assessment against certain lands, benefited by the improvement of a street.

The Court said : "The supposed defect in the procedure is that the land owner had no notice, either actual or constructive, of the hearing before *the Commissioners*, and therefore had no opportunity of presenting his case before them. The decision brought here for review held this to be a fatal infirmity * * The present act does in express terms provide for a hearing in the course of the procedure, its provision in this respect being substantially this : the judges of the Common Pleas of Hudson County are required to appoint three commissioners to assess the cost of these street improvements upon the land benefited, in certain specified proportions, and such commissioners are to make a report, accompanied with

a map of the lands assessed, and which report is to be filed with the clerk of said Court; then notice is to be given for a prescribed period, through the public newspapers, of the filing of said report and map, and that the same will be presented to the Court of Common Pleas of the County of Hudson, for confirmation, at a time to be specified in said notice, and that said Court will at said time and place receive and consider all objections which may be presented in writing against the confirmation of said assessment, and such objections are to be considered and adjudicated by the Court. Power is given to the Court, on such hearing, to confirm or correct or alter such report.

"In view, therefore, of such legislative scheme, the only question arising is whether, according to any known legal principles, the Court can say that the provision thus made is so insufficient that, if the statutory course be pursued, the procedure must fall. It is urged that a hearing before the Court of Common Pleas is not as beneficial to the land owner as a hearing before the commissioners would be. Such is not my opinion, for I think the former much the more preferable, as it would take place before a Court of general jurisdiction, having the power to compel the attendance of witnesses, and to examine them under oath. But, granting the inferiority alleged, what legal value has the fact? Who is to be the judge of what is best in such case, the Court or the Legislature? Such matters, I think, are plainly within the province of the law maker. It is to be remembered that the making of the assessment was an exercise of the taxing power, and that the hearing provided for was very similar to that which usually obtains in the process of ordinary taxation. In the common mode the Assessor values and assesses the property, and the person assessed has an opportunity of a hearing before the Commissioners of Appeals, and not in the first instance before the taxing officer; and in the plan appointed by the present act we have the counterpart of such a procedure if we substitute for the appellate tribunal held by the Commissioners of Appeals, in cases of taxation, the Court of Common Pleas. The Legislature, in the act now before us, has provided that the land owner shall have a hearing of a prescribed character, and I do not see how this Court can say that such hearing is

not sufficient, but that he must have two hearings. For this error I think the judgment of the Supreme Court should be reversed."

This case undoubtedly overrules the doctrine laid down in *The State* vs. *Road Commissioners*, 41 N. J. L., 83, upon which so much reliance is placed by respondents, both cases arising under the same statutes, and the decisions being diametrically and irreconcilably opposite.

Cleveland vs. *Tripp*, 13 R. I., 50, 64.

Action to annul certain assessments for the construction of a sewer. The complainants contended that the statute under which the assessment was made was unconstitutional, because it did not direct any notice to be given of the assessment.

The Court said: "Previously, under other forms of taxation or assessment it has been usual in this State to require notices to be given; but such notices, it has been held, are not essential to the validity of such tax or assessment. * * It has been held by the Supreme Court of the United States that such an assessment without notice and without any right of appeal, is not void for repugnancy to the provision of the Fourteenth Amendment of the Constitution of the United States that no State 'shall deprive any person of life, liberty or property without due process of law.' * * It is enough the Court holds, if the person assessed has an opportunity to contest the validity of the assessment in some judicial proceeding, *after* it has been made. We are not prepared, therefore, to hold the statute unconstitutional on this ground."

Matter Application Mayor, etc., 99 N. Y., 569, 580.

"That the hearing," said the Court "allowed before the Commissioners, follows their estimate of damages is equally an

immaterial suggestion. The same thing is true of assessors in finding their basis of taxation. In each case, the first judgment is tentative and not final, and enables the parties interested to know, before incurring any expense or trouble of a hearing, whether such is needed or desirable."

Brown vs. *City of Denver*, 2 W. C. R., 618, 622.

The Court said: "The doctrine of the authorities is that whenever it is sought to deprive a person of his property or to create a charge against it, preliminary to, or which may be the basis of taking it, the owner must have notice of the proceedings, and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the charadter of the proceedings may be, by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise, at some stage of it, and before the property is taken or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which have been committed, must be given, otherwise, the constitutional guarantee (that no person shall be deprived of his property without due process of law,) is infringed. Learned dissertations upon the phrase 'due process of law, have been written by judges and law writers, but as applicable to summary proceedings of the character under consideration, (viz: proceedings for the construction of sidewalks on streets and the assessment of the costs thereof, on the parties benefited,) the meaning is comprehended in the foregoing paragraph. If the law authorizing the proceedings, provides for notice to the owner of the property to be affected, and gives him an opportunity to appear at a specified time or place before a board or tribunal competent to administer proper relief, in order that he may be heard concerning the correctness of the charge, *before it is made conclusive*, the constitutional requirements are satisfied."

Allen vs. *City of Charlestown*, 111 Mass., 123.

Action to recover money for a sewerage assessment paid to the defendant under protest. The

act provided that an assessment should be made, ascertained and certified by the Mayor and Aldermen on all persons benefited by the construction of a main drain or common sewer, through the consequent drainage of his cellar or land, of which assessment, notice should be give to the parties charged, and that any person aggrieved by such assessment, might, at any time, within three months after notice, apply for a jury.

Said the Court: "The statute which authorizes a part of the charge for making and repairing main drains or common sewers to be assessed upon persons who receive benefit thereby, does not require that such persons should have previous special notice and opportunity to be heard before the Mayor and Aldermen or Selectmen. * * Before they can be legally 'charged' with such an assessment, notice thereof must be given them; after which, if they desire to contest the fact or the amount of their just liability, a proper tribunal is provided for the purpose. * * We discover nothing unreasonable in the provisions, and no want of proper regard for the rights of persons liable to be affected by such proceedings. * * * The assessment having been laid in accordance with law, * * * the judgment for defendant * * * must be affirmed."

Butler vs. *Worcester*, 112 Mass., 541, 555–6.

Action to recover back a sum of money paid under protest, as an assessment for sewerage and drainage purposes in the City of Boston.

"It is now," said the Court, "too well settled to require a discussion of the general proposition, that a statute authorizing the cost of a local improvement of this kind to be levied by assessment upon the estates benefited thereby, according to the judgment of the municipal authorities in the first instance, and allowing to any party aggrieved by their estimate, the right to

have it revised by a jury, is within the constitutional power of the legislature. * * * It is objected that the plaintiff and other parties assessed were entitled to notice and a hearing upon the question of the amount to be assessed upon them, before the tribunal that laid the assessment; and that the only notice and hearing were before the Mayor and Aldermen of 1871, but the assessment was made by the Mayor and Aldermen of 1872, who were not the same persons. But the statutes does not require any notice to be given by the Mayor and Aldermen before laying the assessment, and fully secures the rights of any party assessed, by requiring notice to be given to him of the assessment when made, and allowing him to appeal to a jury when dissatisfied. * * The question whether any hearing should be had before laying the assessment rested therefore in the discretion of the Mayor and Aldermen. The Mayor and Aldermen of 1871, gave public notice to all persons liable to assessment under the Statute, that it was intended to assess upon them 'their proportionate share of the expenditure of said city for drains and sewers according to law, and that they might be heard on any objections which may be made to said assessment; and after such hearing determined that a portion of the expense of the sewers be assessed upon the property specially benefited,' and then referred the papers to the next Board of Aldermen."

"The plaintiff was not entitled as a matter of right to be heard before the new board on the amount to be assessed upon his estate. His remedy, if he was dissatisfied with that amount, should have been sought by application to the Mayor and Aldermen for an abatement, or by petition for a jury as provided in sec. 4."

Hagar vs. *Reclamation District*, 111 U. S., 710.

The Court said: "Where a tax is levied on property according to the value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain. * * * the officers in estimating the value act judicially, and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in pre-

scribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

"In some States, instead of a Board of Revision or Equalization, the assessment may be revised by proceedings in the Courts, and be there corrected if erroneous, or set aside if invalid, or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment, which can be deemed essential to render the proceedings due process of law. The assessment under consideration could by the law of California be enforced only by legal proceedings, and in them any defense, going either to its validity or amount, could be pleaded * * The numerous decisions cited by counsel * * as to the necessity of notice, and of an opportunity of being heard, are all satisfied where a hearing in Court is thus allowed.

2. It is next urged that the parties were entitled to personal notice of the proceedings; and that, as the only notice provided by the statute is by publication, this violates their constitutional rights.

To this I answer:

The contrary has been established by such a long line of precedents that it almost seems affectation to cite them. Nevertheless, the following are a few of the decisions:

People vs. *Mayor of Brooklyn*, 4 N. Y., 441.

"Another [objection] is, that no notice was given to the owners of land assessed. In the case of the *Owners of Ground, etc.*, vs. *The Mayor, etc., of Albany* (15 Wend., 374), it was adjudged that the Legislature had authority to prescribe what notice should be given in the case of an assessment like the pres-

eat, and, if notice was given as thus required, it is sufficient. The only notice required by the statute under which the present assessment was made, is a notice to be published in the corporation newspapers for ten days before the day fixed for the alteration or confirmation of the assessment by the Common Council. This gives to any person assessed an opportunity to be heard, and it is all the notice necessary."

The Methodist vs. *The Mayor*, 6 Gill, 391.

Under a charter authorizing the proceeding, the Mayor and City Council ordered a street widened, and appointed a Board of Commissioners to assess and tax the expenses thereof upon certain property. The Commissioners were to give sixty days' notice by publication that they would proceed at a given place to exercise the power and perform the duty assigned them. The law provided that an appeal to the Baltimore City Court be allowed to all persons improperly assessed—said Court having power to hear and fully examine the subject and decide therein, with provision for summoning a jury, to try any question of fact. The only notice provided of the completion of the assessment, was, that "the Register of the City of Baltimore shall cause a copy of said assessment to be published for thirty days, in at least two of the daily newspapers of said city." The time for an appeal from such assessment was thirty days after the Register's publication.

Where all these publications had been made, the Court said :

"The law imputes notice, and will not admit testimony to disprove it in a case like the present."

Matter of De Peyster, 80 N. Y., 567.

Said the Court: "The determination of a municipality to enter upon a work of local improvement is not invalid for the lack of prior notice to owners of property to be affected, of an intention so to do.

"The appellant testifies that he had no notice that an assessment was to be imposed on him; by which is meant, as we understand it, notice personal and peculiar to himself. Personal notice is not needed. The Legislature may prescribe what the manner of notice shall be. * * * The Legislature has prescribed for notice before the assessment is final and effectual. Chap. 326, Laws of 1840, Sec. 2, has provided for notice of the completion of the estimate and assessment to be given to owners or occupants of premises affected. This notice is by publication in daily newspapers, for objections in writing to be presented in a time named, which, if not yielded to by the primary Board, are to be sent up with the assessment to the reviewing and confirming Board. * * * *We will not reason to the end, that such notice is all that is exacted by the law of the land. Such has been the course of procedure in such cases, too long to be now disturbed, save by legislative or fundamental provision.* * * * It [the petition] presents the question of whether it is needful that there should be personal and individual notice, as distinguished from the public and general notice given by advertisements in newspapers. *We think that it is not needful.*"

Stuart vs. *Palmer*, 74 N. Y., 183.

Commissioners were appointed to lay out Atlantic avenue, in the City of Brooklyn. They were to assess the value of the land taken, and to assess the amount of the award and expenses upon the lands and premises benefited. Before making the assessment and awards, public notice

was required to be published in two or more public newspapers of the county of Kings, at least twenty days before the same were to be made, of the time and place of meeting to make the same. (*Vide* these proceedings, stated in this case, in 17 Hun. 23.) Of this the Court of Appeals said:

"The Act made ample provision for notice to and hearing of all the persons interested before the making and final confirmation by the Supreme Court of the award and assessment. The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice."

Johnson vs. *Joliet*, 23 Ill., 202, 206.

"Had the Legislature in this case—the exercise of the right of eminent domain—prescribed the ordinary notice by posting or publishing in a newspaper, which the owner might never see * * * though such constructive notice, in a great majority of cases, would not reach a non-resident, yet all will admit he would be bound by it."

The State vs. *The Mayor*, 24 N. J. L., 662.

Of Commissioners appointed to make an assessment of expense incurred in improving a street, the Court say:

"It is obviously proper that they should hear the parties interested; and I think such parties, if accessible by reasonable diligence, are entitled to notice of the time and place of their meeting to fulfill their duties. * * * *Where the statute provides for a notice by advertisement or otherwise, such a notice is sufficient.*"

Owners of Ground vs. *The Mayor*, 15 Wend., 374.

Proceeding for the opening of a public square, for assessment according to benefits, etc. The

only notice to owners of property affected was one published in public prints, "specifying the ground required, and the time and place at which the damages and recompense to the owners thereof would be inquired into and assessed, and the damages apportioned amongst the owners of ground to be benefited." The Court held the notice sufficient, saying:

"The only reasonable rule, therefore, is that the Legislature shall prescribe what notice shall be given."

Wilson vs. *Hathaway*, 42 Iowa, 173, 176.

The Court said:

"We have no doubt of the power of the Legislature to provide for the condemnation of the right of way for public highways, upon notice by publication in newspapers, or by notices posted. The proceeding is in the nature of proceedings *in rem*, in which the Court acquires jurisdiction of the property, which is the subject of the adjudication."

Cupp vs. *Commissioners*, 19 Ohio St., 173.

Application was made to enjoin the County Commissioners from constructing a ditch. Although notice by publication was admitted, petitioners averred that they were never served with actual notice of the proceedings.

Said the Court:

"Nothing is better established as law than that such rights (*i. e.*, the right of the public to take and that of the owner to receive compensation for his land) may be affected, and lost to the owner by a proceeding *in rem*, and upon merely constructive notice. The law of all such proceedings rests in the necessity of the case, and in no instance, perhaps, is that necessity more plainly apparent than in the construction of public roads and other improvements of like nature. Without the aid of some

such proceeding the construction of roads and ditches would be next to impracticable. A similar proceeding is provided, and a like provision as to the waiver of claims is made, in the law for the establishment of roads. * * Some such provision of law seems indispensable. The owner of land necessary to be used for a road or ditch may be absent or unknown. The title may be in dispute. The legal title may be in one, and the equitable title in another. One may have the present estate, and the other the reversion or remainder. The owner may make a secret conveyance, on purpose to evade the law. Without the power to proceed in such form against the *land itself*, the right guaranteed to the public by this provision of the Constitution, to take the land for public uses, would be of little avail. In the construction of such improvements, of any considerable length, personal notice, if at all practicable, would be attended with great inconvenience and uncertainty. It was the duty of the Legislature to provide some reasonable means for securing both to the public and to the owner of land these rights, so guaranteed by the Constitution. To require in such cases personal notice to the owners would, in our judgment, be quite as unreasonable as to require that owners of land should * * * 'maintain some kind of an agency in the vicinity of their lands, through which they may be informed of proceedings affecting them.' They are presumed to know of the existence of this Act, and therefore to have notice that their lands are liable at any time, upon four weeks' notice of publication to that effect, to be taken for the use of a ditch, and that their non-claim will be taken and held as a waiver of all right to compensation or damages. The whole proceeding is substantially *in rem*. * * * Jurisdiction over the person of the parties is not necessary. The Act in question relates to and affects only the remedy and not the rights of the parties, and is therefore within the general scope of legislative power. The Constitution does not take away that power. It defines and guarantees the right of the party to his land, or to a sure and adequate compensation therefor. The remedy—the proceeding by which that right is to be affected—is still left to legislative discretion."

Polly vs. *Saratoga*, 19 Barb., 449, 460.

Under the provisions of an Act of the Legislature, notice was given by publication in a newspaper, that at a time and place named, a jury would be drawn to appraise the value of certain lands which were needed for defendants' roadway.

The Court said:

"It is objected that the plaintiff had no notice of the drawing of the jury by the Clerk, Sheriff and Judge. If by this is meant, no notice in writing was served on him of the time and place of such drawing, the objection is founded in truth. But such written notice was not required by the ninth section of the Act. All that is demanded by that section is, that the Judge, on receiving the petition, shall direct the Sheriff of the county to give public notice in at least one newspaper printed in the said county, that at some future day, not less than thirty days from the first publication of the said notice, the Clerk of the county and the said Judge will proceed to draw at the Clerk's office the names of twelve persons, etc. The plea alleges that the Judge appointed the day for this drawing, issued his warrant to the Sheriff, requiring him to give notice by publication, and that said Sheriff did publish the notice as required by law, in a public newspaper in said county, the name of which is given. These facts are admitted by the demurrer. The plaintiff, therefore, had precisely the notice which the statute required."

Freetown vs. *County Commissioners*, 9 Pick. 46.

Speaking of the sufficiency of the notice of proceedings for laying out a road, the Court said:

"We have taken much pains to ascertain whether due notice was given of the meeting of the Commissioners, to consider the application for this road, so that a hearing might have been had of the inhabitants of Freetown, who now ask to have the

proceedings quashed. The result of our inquiries is, that there was, without doubt, such notice. The statute giving authority to Commissioners of highways, prescribes no particular mode of notice. It merely requires that 'reasonable notice' shall be given of the time and place appointed for viewing the road prayed for, and after such view and hearing of the parties, the Commissioners shall have power to order and determine the making of such road. The mode of giving notice seems to have been left by the Legislature to the discretion of the Commissioners. They adopted the practice of advertising in a newspaper printed in the county, the time and place of meeting for the consideration of the application. All official notices had been usually published in the same way. There having been legal notice of the meetings. * * we do not think that a certiorari ought to be granted on account of formal defects in the proceedings."

Squares vs. *Campbell*, 41 How. Pr., 193, 200.

An Act for the seizure of estray animals trespassing on private lands and public highways, authorized in a special proceeding by the party aggrieved, service of summons on the owner by posting in public places.

The Court said:

"It is urged with much force, that service by posting as to a known owner of the animal seized, is not a sufficient service on which to predicate a due proceeding at law. With the propriety of the enactment Courts have nothing to do; that is for the Legislature, in its wisdom and discretion, to consider. I deem it well settled that the Legislature has the power to allow such service. Service by publication is allowed; service by posting on the door of a concealed defendant is allowed. In this case, it makes one rule of service for all, both when the owner is known and unknown. If the owner was unknown more could not reasonably be required; if known, it would be well calculated to give the person notice of the proceedings, so that the propriety of the manner of service cannot reasonably be ques-

tioned. The Legislature is required to make general rules; it cannot make a rule for each particular case. It is, however, sufficient to say that the Legislature deemed that mode of service sufficient."

Matter of the Empire City Bank, 18 N. Y., 199.

Action to enforce the personal liability of stockholders in an insolvent bank, under the Act of 1849. (Ch. 226.) This Act provided that notice of a hearing before a referee should be given to all stockholders not residing in the county, by publication in the State and county newspapers.

"The question is," says the Court, "whether personal service of process, or actual notice to the party, is essential to constitute due process of law. * * * It may be admitted that a statute, which should authorize any debt or damages to be adjudged against a person upon a purely *ex parte* proceeding, without a pretense of notice, or any provision for defending, would be a violation of the Constitution and be void; but where the Legislature has prescribed a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend, I am of opinion that the Courts have not the power to pronounce the proceeding illegal. The Legislature has uniformly acted upon that understanding of the Constitution. * * * If we hold, as we must, in order to sustain this legislation, that the Constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, it then belongs to the Legislature to determine whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him. * * * I conclude * * * that the proceeding does not lose the character of legal process, within the constitutional provision, by the omission to require personal notice to be given to all the parties to be charged as stockholders."

Tracey vs. *Corse*, 58 N. Y., 143, 151.

"That the proceeding is *in rem*, does not dispense with the rule of universal justice, that a party shall not be condemned without an opportunity to be heard. It is true that he is not entitled to personal notice, before a Court can adjudge a forfeiture of his property; but he must have notice, either actual or *constructive*, of the proceeding, or it will be void. * * * Notice may be given * * by publication, according to the usual practice of the Courts, and then he is bound to defend or assert his rights, if he has any. Notice in this way may never, in fact, reach him. In many cases the giving of personal notice is impracticable, nor is it required. But the rule requiring notice, either actual or *constructive*, is fundamental, and ought never to be departed from."

Chamberlain vs. *Cleveland*, 34 Ohio St., 551, 569.

An assessment was levied for the opening of a street, and was subsequently equalized by a Board of Equalization.

"It is objected by the plaintiff," says the Court, "that the equalized assessment is void, on the ground that no notice was given of the time the Board of Equalization would proceed with the equalizing of the assessment, nor was any notice given of the filing of the same with the clerk or council. We do not think this objection well taken. By the provisions of Sec. 585, (Municipal Code), before adopting the assessment made by the assessing Board, the council is required to publish notice for three consecutive weeks, that such assessment has been made, and that the same is on file at the office of the clerk, for the inspection and examination of any person interested therein. We think that, after the notice required has been given, all persons interested have reasonable opportunity to be heard against the assessment, and that, from this point, the proceeding must be regarded as pending, and that all persons interested are bound to take notice of what is done up to the time the equalized assessment is confirmed."

Taylor vs. *County Commissioners,* 18 Pick., 309.

Action to quash proceedings for laying out a road. Notice of the location was given by publication in conformity with the statute. Petitioners, being non-residents, denied the sufficiency of the notice.

Shaw, C. J. said: "Had the Legislature intended that every proprietor over whose land the way passes should have personal notice, the statute would have so directed. But it is obvious to perceive what difficulties would arise from requiring the commissioners, who are public officers, charged with public duties, to ascertain the titles of all the lands traversed by the highway intended to be located, and on peril of rendering their proceedings erroneous to give notice to the right person. We think that the Legislature intended to provide for a mode of constructive notice, which should bind all persons, by whatever titles they should hold, whether resident or non-resident, and whether they had long held their estates or acquired them during the pendency of the proceedings. It may sometimes happen that actual notice may not be received, but the Legislature must have considered that, on the whole, it would operate to save the rights of parties for all practical purposes. It is made constructive notice by force of the statute, and is to have the force and effect of actual notice."

Risley vs. *City of St. Louis,* 34 Mo., 404, 417.

Proceedings were had for opening an avenue, and assessing the costs of and damages for the same, notice of which was given by publication.

Said the Court:

"The fact that the plaintiff had no actual notice of the proceedings does not invalidate them as to him, or release him from liability. The act only requires notices to the persons to be benefitted, to be given by publication in newspapers, as was done."

People vs. *Hagar*, 52 Cal., 171.

Proceedings for reclaiming swamp lands are inaugurated by petition, accompanied with a notice by publication of the hearing of the same. The complaint averred that the Board ordered the petition to be filed, and four weeks' notice to be published of its hearing; that the petition and order were published, and that the petition was thereafter heard by the Board of Supervisors.

The Court said:

"All the parties in interest were brought before that tribunal (the Board of Supervisors) by a proper notice."

The following additional cases are also directly in point; but, I do not deem it necessary to do more than to refer to them:

Gilmore vs. *Hentig*, 33 Kas.
Rockwell vs. *Nearing*, 35 N. Y., 317.
Wilson vs. *Hathaway*, 42 Iowa, 173.
Matter of Lower Chatham, 35 N. J. L., 497.
State vs. *The Mayor*, 31 N. J. L., 360.
State vs. *Village*, 37 N. J. L., 65.
Scott vs. *Brackett*, 89 Ind., 413.
People vs. *Smith*, 21 N. Y., 595.
Potter vs. *Ames*, 43 Cal., 78, 79.
Matter of Application of Mayor, 99 N. Y., 569, 581.

3. It is objected next that the notice provided by the statute "was not authorized to be directed to the property-owners affected, either by name,

or by the most general reference to the property, nor was it required to give any information of any assessment upon any property. It was simply a notice that the report of the Board had been filed and was open to inspection."

To this I answer:

First.—A notice that the report, made under a general statute, of which all persons are bound to take notice, is completed, and that it is deposited at a certain place for inspection, is the notice usually given in cases of this character. Where the statute fixes the limits of the district to be assessed, it is not necessary that such notice should give the names of the parties.

In the Application of the Mayor, 99 N. Y., 580, the Court of Appeals of New York said:

"The objection specifies these grounds of complaint: That no notice to the land owner is required before the filing of the report. * * * *The Statute itself condemns and appropriates for the public use the precise lands selected by metes and bounds so that every owner affected had means of knowing that his land was taken.* * * * The Commissioners, after making their report, are commanded to file it in the office of the Commissioner of Public Works in the City of New York, at least fourteen days before its presentation to the Court, for the inspection of whom it may concern, and *give notice for ten days by a daily advertisement in the papers above described of such deposit*, and of the date at which the motion for confirmation will be made, and within such ten days any person interested may file his objections to the appraisal with the Commissioners. * * * *There is thus secured to the land-owner notice of the proceedings against him.* * * * Notice by publication we have many times held to be sufficient, and that the Legislature may prescribe the manner and time."

The City of Ottawa vs. *Macy*, 20 Ill., 413.

This was an application by the City Collector for judgment against certain lots, benefited by the improvement of certain streets, for assessments thereon.

Among other objections interposed to the assessment, were: 3rd. That the Commissioners did not give sufficient notice of the time and place of making the assessment, and 5th, that the City Clerk did not give sufficient notice of the time and place of confirming the assessment.

The ordinance relating to assessments for public improvements provided, that Commissioners should be appointed, and (Sec. 6.) before entering upon their duties, they should give at least six days' notice in the corporation paper of the time and place of making their assessment. The section then prescribes the form of the notice and under it the Commissioners published the following notice, which, in all respects, conformed to the requirements of the statute:

"Public notice is hereby given *to all parties interested* that the undersigned Commissioners, appointed by the City Council to assess the sum of $7,666 14, on the real estate *benefited by the gravelling of La Salle street from the south side of Main street to the canal bridge*, * * will meet at A. B's office in said city, on July 25th 1857, at 9 A. M., for the purpose of making such assessment."

The City Clerk under the provisions of sec. 9 of the ordinance and of sec. 6 of article 8 of the

City Charter, published the following notice of confirmation of the assessment, when completed:

"Public notice is hereby given *to all parties interested* that the Commissioners appointed by the City Council * * * to assess the sum of $7,666 14, on the real estate in *the part of the city benefited by graveling of La Salle street from the south side of Main street to the canal bridge*, and paving and curbing the gutters of the same, have completed their assessment, and made return of the same to my office. Any person wishing to appeal from said assessment, must file their objections on or before August 18th, 1857, at 7 P. M., as the City Council will at that time, at the Council room, hear all objections to the assessment, and revise and confirm or amend the same."

The Charter of the City provided that, on receiving the assessment list from the Commissioners, the City Clerk should cause a notice to be published in one or more of the city newspapers, to *all persons interested therein*, of the completion of the assessment and filing the roll. * *

"It is insisted" said the Court, "that this form of notice to all persons interested, as under it a person may be deprived of his property, is not sufficiently special, and that the notice should contain either a description of the lands assessed, or the names of the owners of the property assessed; that the notice is too general to effect the object intended by notice. It is a sufficient answer to this objection to say that it confirms to the requirements of the statute; it is general because the statute allows a general notice. * * The notice is also in strict conformity with the form adopted by the ordinance of the Common Council. Section 4 of article 8, of the charter requires the Commissioners to give six days notice in one or more newspapers published in the city of the time and place of meeting prior to making assessments, to all persons interested. * * * If a more particular notice might have been given after the assessment, the Legislature should have so required. In their wisdom, it was not deemed necessary, but the

same phraseology is used in the sixth section, (that relating to notice of confimation.) The notice given contains a description of the property assessed sufficiently particular to arrest the attention of the owners of lots or land in that described locality. * * * We can see no force in the objections made to rendering judgment against the lots assessed."

Secondly.—It is not necessary to describe in the notice the property affected where the limits of the district are defined by a public statute of which every person must take notice.

It will be observed that the district in which the assessment is to be made—and in which it can alone be made—is clearly described and defined by section three of the Act. The Act is a public statute, of which every person takes cognizance.[1] The limits of the district to be affected by the improvement are distinctly given in the statute. This is notice to every land-owner within those limits that his land is affected by the report of the Commissioners. As was said by the Court of Appeals of New York in a case already cited, "the statute itself condemns and appropriates for the public use the precise lands selected, by metes and bounds, so that every owner affected had means of knowing that his land was taken."[2]

The notice provided by section seven amounts, therefore, to a notification to all property-owners

[1] C. C. P., § 1898.

[2] Matter of Application of Mayor, 99 N. Y., 580.

in that district that their property has been assessed, and that the assessment is in the office of the assessors, open for inspection.

This fact, at once, distinguishes the case from *Boorman* vs. *Santa Barbara*, upon which the plaintiffs rely. There, the Act neither fixed the boundaries of an assessment district, nor authorized any person to fix them. At most, the notice given amounted simply to a general notice to the owners of the property to be affected. But, who could tell what property would or would not, in the judgment of the Commissioners, be affected? "Who can know," says the Court, "that *his* property may, by the Commissioners, be deemed to be benefitted by the proposed improvement?" Of this fact, neither the Act nor the notice informed him. This uncertainty in the limits of the assessment district is the element which vitiates the notice. The Court adds these significant words: "It is possible, if the Commissioners were authorized to fix the limits of the assessment district, finally or conditionally, in the first instance, and then to give notice—even by publication—to the owners of property within the district, the process would be sufficient."

In the case at bar the limits of the assessment district where known, were fixed by law. Hence, a notice that an assessment of that district, the whole of it—an assessment made by officers who

could assess that district and none other—had been made, was a notice to every person in that district that a "burden would be imposed upon him or his property."

Thirdly.—In cases of this nature, the all but universal practice is to prescribe that the report, when made, shall be left at a designated place for inspection, to give notice of that fact by publication, and to afford aggrieved parties an opportunity within a given time to file or make their objections before a revising Board, tribunal or Court.

Cal. Stats. of 1883, Ch. 24, Secs. 6 and 7.

A general Act in regard to the improvement of streets, lanes, etc., and the construction of sewers within municipalities.

"The Superintendent of Streets shall make an assessment list of the damages and benefits, which shall be known as the assessment roll.

"Said assessment roll, when completed, shall be by said Superintendent of Streets filed with the City Clerk.

"Sec. 7.—Upon receiving said assessment roll, said City Clerk shall forthwith give notice, by publication for at least five days in one or more daily newspapers published and circulated in such city, or by at least one insertion in a weekly newspaper so published and circulated, that said assessment roll is on file in his office, the date of the filing of the same, and that the same is open for public inspection. The owners of land in said assessment district, whether named or not in said assessment roll, and all other persons directly interested in any property affected by the assessments set forth in said assessment roll, feeling aggrieved by any act or determination of the said Council or said Superintendent of Streets in relation to said assess-

ments or assessment roll, or having or making any objections to the legality of said assessments or assessment roll, or other act, or determination, or proceeding of said Council or Superintendent of Streets, shall, within ten days after first publication of such notice, appeal to said Council by briefly stating their objections in writing and filing the same with the Clerk of said Council. * * * * Upon the hearing of such appeal or appeals, the said City Council shall have power to approve and confirm said assessment roll, or to refer the same back to the said Superintendent of Streets, with directions to alter or modify the same. * * * * and if the Council, upon examination, shall find that the alterations and modifications have been made according to the directions contained in the resolution of reference, the said Council shall adopt and confirm the same."

Charter of the City of Stockton, (Cal. Stats., 1871–2, p. 608.)

The Assessor shall prepare an assessment list of the damages and benefits resulting from works of local improvement.

"Said assessment list, certified by the Assessor, shall be presented to the City Council. On a day to be appointed by them, of which notice shall be advertised for one week in some newspaper published in said city, the said City Council, or a committee thereof for that purpose appointed or designated, shall sit as a Board of Equalization on said assessment. The owners of the land assessed, the contractor or his assigns, and all persons directly interested in said assessment, whether named therein or not, feeling aggrieved by any of the acts or proceedings concerning such assessment, or having or making any objection to the correctness or legality of the same, shall at such time specially make known the cause of objection or complaint. Said Board may correct, alter or modify said assessment in such manner as to them shall seem just, and may instruct and direct said Assessor to alter and correct said assessment or diagram in any particular, and to make a new diagram at their option to conform to the decisions of the Board."

An act to construct a canal through Channel Street, (Cal. Stats., 1871–2, pp. 926, 931.)

After providing that the Commissioner shall make an assessment of the damages and benefits flowing from the construction of the canal and the taking of lands therefor, the Act provides:

"On the completion of said assessment, the said Commissioners shall cause to be published for ten days, a notice of the completion of said assessment, and inviting all parties interested therein to examine the same; and for that purpose said assessment, maps and valuation shall be open and exhibited to public inspection at the office of the said Commissioners for thirty days after the first publication of said notice. * * * Thereafter they shall complete the same in the form of a report and schedule, embracing the value of the land taken for public use, and the assessment of the amount of the same as hereinbefore provided, upon the several parcels of land embraced within the benefited district which report shall, at the expiration of said thirty days, be filed with the Clerk of said County Court, * * * together with a petition signed by at least two of said Commissioners, praying for a confirmation of said report. On filing such petition and report to said Court, the Judge thereof shall assign some day, not more than thirty days thereafter, as the time when any objection to the confirmation of said report will be heard by said Court; and the Clerk of said Court shall cause to be published for ten days, in three daily newspapers published in said City and County, a notice of filing said report and of the day assigned for the hearing of any objections that may be made thereto, and any party interested therein may at any time before the day assigned for the hearing thereof file in said County Court his objections, in writing to the confimation of the same, specifying with particularity his objections. * * * Upon the day assigned for a hearing of objections thereto, * * * the said Court may hear the allegations of the parties and the proofs adduced in support of the same, and after duly considering the same may confirm said report, or change, alter, or modify the same or cause the same to be changed, altered or modified by said Commissioners, and then confirm the same, as the justice and law of the case may require."

An Act to provide for the opening and extend-

ing of Leidesdorff Street, in San Francisco. (Cal. Stats. 1875–6, p. 563):

"It shall be the duty of the Commissioners, immediately upon the filing of their report with the Clerk of the County Court, to give notice, by publication in at least two newspapers printed and published in said city and county for ten days, daily, that said report has been filed with said Clerk of the County Court, and that any owner of property affected by said report, feeling aggrieved by or objecting to said report, may file in said County Court his objections, in writing, thereto, at any time within twenty days after the first publication of said notice. * * The County Court shall take jurisdiction of all matters pertaining to said report and objections thereto, and shall hear and determine within thirty days after the filing thereof all objections to the same, * and may make such orders and decrees in said matter as it shall deem just and equitable, and to that end may hear testimony and pass upon all questions arising in said proceedings."

An Act to authorize the City of Oakland to construct a bridge across the estuary of San Antonio. (Cal. Stats. 1875–6, pp. 653, 655):

The Act provides that the Commissioners shall assess the lands benefited by such construction, and then continues:

"Within thirty days after their appointment, * the Commissioners shall make a report to the Council of the assessments so made by them. * * Upon receiving the report and assessment, * the same shall be filed with the City Clerk, and the Council shall forthwith give notice, by publication for at least five days, * that said report and assessment are on file in the Clerk's office, the date of filing, and that they are open for public inspection. The owners, whether named in the assessment or not, the contractor, or his assigns, and all other persons directly interested in the said report and assessment, feeling aggrieved by any act or determination of the Commissioners in relation thereto, or having or making any objection to the legality of the assessment, or other act or determination or proceeding

of the Commissioners shall, within twenty days, * appeal to the City Council. * * Upon such appeal the said City Council shall have power to approve and confirm said report and assessment, or refer the same back to the Commissioners, with directions to alter or modify the same. * * And if the Council, upon examination, shall find that the alterations and modifications have been made, * the said Council shall, by ordinance, adopt and confirm the same."

An Act to open, etc., Fifteenth Avenue Extension, in San Francisco. (Cal. Stats. 1875–6, pp. 762, 765):

The Commissioners shall prepare an assessment and report of the damages and benefits.

"Such report, as soon as the same is completed, shall be left at the office of said Board, daily, from 8 o'clock A. M. until 5 o'clock P. M., for thirty days, for the free inspection of all parties interested, and notice that the same is so open for inspection for such time and at such place shall be published by said Board, daily, for ten days, in two daily newspapers printed and published in said city and county; *provided*, that notice, in writing, of such assessment shall be sent through the Post Office to each of said owners, so far as the same can be ascertained. * * * Any person feeling dissatisfied with the determination of said Board of Commissioners as to the value of the amount of damage to, or the assessments upon, lands or property owned, claimed or occupied by him, shown in the report provided for in the last preceding section, may have a summary hearing thereupon before said Board, in person or through counsel, at any time before the filing of said report. * * * At the expiration of the time allowed for such hearing * * * said Board shall proceed to review its said report, and, if necessary, correct or modify the same; and when such revision is completed, shall file its said report as revised, together with a map of said Fifteenth Avenue Extension and the land assessed, in the Clerk's office of the County Court of said city and county, with a petition, signed by said Board, or a majority thereof, for the confirmation of said report. * * *

Notice of the filing of said report and map, and the petition for the confirmation of said report, and of the time and place appointed for the hearing of said petition, shall then be given, by publication thereof, daily, at least ten days before said hearing, in two daily newspapers in said city and county. * * * On the day appointed for the hearing of said petition * * * all persons interested may be heard before said Court in relation to any of the matters contained in the report, and the Court, after hearing the allegations and proof of all persons interested, and ascertaining to its satisfaction that notice of such hearing has been duly given, may confirm, set aside, or modify said report, and, if necessary, refer the same back for revision and correction to said Board."

An Act to open Sixth Street in San Francisco, (Cal. Stats. 1875–6, pp. 866, 873, 876–7,) makes the same provisions in regard to the filing of the report and notice thereof, and the subsequent hearing, as in the case of the Fifteenth Avenue extension.

An Act to provide for the opening and widening of streets in San Jose, (Cal. Stats. 1877–8, p. 621.)

Sec. 6. The Commissioners of estimate and assessment "shall make their report in writing, within sixty days after their appointment and file it in the office of the City Clerk. * * On filing such report the City Clerk shall give notice thereof for ten days in some newspaper published in said city."

It shall be the duty of the Mayor thereupon, to appoint a committee of reference "which committee shall hear any objections to the confirmation of said report upon a day to be appointed by them, * such committee shall hear the allegations of the parties interested who may appear before them, * and shall recommend the confirmation or rejection of said report. The Mayor and Council may thereupon confirm the report," or may set it aside, or refer it back to the Commissioners.

An Act to provide for the opening of Tehama Street in San Francisco, (Cal. Stats., 1877–8 pp. 802, 806,) provides:

That the Commissioners shall prepare a report, which as soon as completed, shall be left at the office of said board * for thirty days for the free inspection of all parties interested, and notice that the same is so open for inspection shall be published by the board daily for ten days, in two newspapers of San Francisco, * and written notices thereof shall likewise be mailed to all known owners and persons affected.

Any person feeling dissatisfied with the determination of the Commissioners as to damages or benefits might have a summary hearing before the board; that the board should review and if necessary, correct its report, and file the revised report and a map in the office of Clerk of the County Court, together with a petition for confirmation. That upon the filing of the report and map, the County Court should take jurisdiction of the proceedings, and that notice of such filing and of a time for a hearing appended by the Court, should be given by publication. That thereafter on the designated day, the Court should hear the allegations and proofs of the parties aggrieved, and thereupon, set aside, refer back or confirm the report.

An Act to establish Montgomery Street south, (New Montgomery,) in the City of San Francisco, (Cal. Stats. 1877–8, p. 933.)

The report of the Commissioners for the assessment of damages and benefits resulting from the opening of the streets, shall, "when completed, be filed in the County Court, and notice of such filing be published for five days * in two daily newspapers. * Within twenty days after the filing of such report, written objections thereto, to any matter contained therein * may be filed in said office on the part of any owner or party interested in property to be taken or injured by the said improvement, or assessed for benefits arising therefrom."

On a day to be appointed by the Court, it "shall proceed to

a hearing upon said report and objections, and take proofs in relation thereto, and "may confirm, modify or reject said report wholly or in part," or refer it back to the Commissioners.

By Sec. 13 and 14 of the same Act, provision is made for the filing of a report of *costs and benefits*, in which precisely the same procedure obtains as with the report of damages.

An Act to establish the Sacramento River Drainage District, (Cal. Stats. 1877–8, pp. 987, 991.)

The Commissioners shall appraise the damages and benefits resulting from the construction of certain canals, and prepare lists of the same.

"Upon the completion of said lists, said Commissioners of assessment shall publish, in at least one newspaper, * for not less than two weeks, a notice stating that said lists have been prepared, and that said Commissioners of Assessment will sit * for the purpose of hearing and determining any objections that may be made to said assessment. * * During such sittings, any person interested may appear * * * and state his objections to the assessment, * and upon such hearing, any assessment found to be erroneous shall be corrected."

The Act to authorize the Supervisors of San Francisco to change the grades of certain streets, (Cal. Stats. 1867–8, p. 594,) under which the Second Street cut improvement was made, provides that—

The Commissioners, after preparing a report of the costs and benefits, shall "subscribe the same and file it in the office of the Clerk of the Board of Supervisors," and that, "on filing such report, the Clerk of the Board of Supervisors, shall give notice thereof for five days, by publication."

The machinery prescribed after the filing of the report for its review and confirmation is the same

as that provided for in the Act relating to streets in San Jose.

Nor is the above a procedure which has prevailed here only in latter years. We find it followed as far back as 1862, if not earlier.

An Act concerning the construction and repair of levees in the County of Sacramento (Cal. Stats. 1862, pp. 151–155) provides that—

The Assessor shall estimate the benefits arising from the reclamation improvements contemplated by that Act, and assess them to the lands benefitted, and "as soon as such assessment is completed, shall deliver it to the Auditor, who shall forthwith give notice, by publication in each paper published in the city, that the special levee assessment roll has been completed, and is in his possession, open for examination, and that the Board of Equalization will, upon a day * named * meet to hear and determine complaints in regard to valuation and assessments therein. * Upon the day specified * the Board * shall meet * * to hear and determine such objections to the assessments and valuations as may come before them; and the Board may change the valuation as may be just."

The Charter of New York City (N. Y. Laws 1813, Ch. 87.) provides:

The Mayor, Aldermen and Commonalty may, when they deem the laying out or opening of a street, or any part thereto, necessary or useful, order said opening or laying out to be made.

2. Whenever lands shall be deemed required for such opening and laying out, the Supreme Court, on the application of the Mayor and Commonalty, shall have the power to appoint three commissioners of estimate and appraisement, who, after being sworn, shall view the premises required for the taking, and shall prepare a report showing the relative aggregate amount of

damages and benefits that will accrue from the opening, also the names of the different owners, with the description of their property, and the amount of damage or benefit which each is deemed to sustain by the improvement.

The Commissioners, after completing their estimate and assessment, and at least fourteen days before they make their report to the Court, shall deposit a copy or transcript of the estimate or assessment in the Clerk's office of New York City, for the inspection of whom it may concern, and shall give notice by advertisement to be published in two of the public city newspapers, of the deposit thereof in the said office, and of the day on which their report will be presented to the Court. Any person objecting to the report may state his objections in writing to the Commissioners within ten days after first publication, and in case of such objections, the Commissioners shall reconsider their assessment, or the parts objected to, and in case the same shall appear to them to require correction, but not otherwise, they shall and may correct the same accordingly.

The Commissioners shall report to the Supreme Court, without unnecessary delay, and on the coming on of their signed report, said Court shall, after hearing any matter that may be alleged against it, confirm the report, or refer it back to the same or new Commissioners for revisal or correction, and has power to re-refer until a report is returned which the Court will finally confirm. The report, when confirmed, shall be conclusive on all parties.

The above are the only provisions made by the charter in regard to notice or a hearing of the parties affected at any stage of the proceedings.

The provisions of this Act have been adopted in most, if not in all the important street improvements in New York City, the statutes authorizing and setting on foot those improvements, expressly adopting the machinery provided by the existing law for the appraisement and confirmation of the assessment of damages and benefits. The

law of 1813 was in force at the time of the passage of all the statutes referred to. As examples see—

The Widening of Broadway, N. Y. Laws of 1871, Ch. 57, Sec. 4;

Matter of Widening Broadway, 61 Barb., 484;

Act to Reorganize the Government of N. Y. City, N. Y. Laws 1873, Ch. 335, Sec. 105;

Act for Laying Out and Improving Certain Portions of N. Y. City, N. Y. Laws 1865, Ch. 565, Sec. 4;

Act Relating to Central Park Commissioners, N. Y. Laws 1866, Ch. 367;

Also, N. Y. Laws 1870, Ch. 383, Sec. 5.

Charter of Rush City, (Minn. Spec. Laws, 1878, Ch. 24, Sub. Ch. 6, p. 101.)

After providing that the Common Council shall have the care and control of streets, etc., and may alter, open, widen, improve and straighten the same, and may appoint Commissioners to view the premises affected and assess the damages, and that said Commissioners shall file their report to the Common Council with the Recorder, the statute continues:

"*Upon such report being filed in the office of the Recorder, said Recorder shall give at least ten days' notice, by publication in the official paper,* * *to the effect that said assessment has been returned, and that the same will be confirmed by the Common Council at a meeting to be named in said notice, unless objections are made, in writing, by persons interested in any land*

*required to be taken * * The Common Council*, on the day fixed for the hearing of such report, or at such subsequent meeting to which the same may stand over, *shall have power, in their discretion, to confirm, reverse or annul the assessment*, giving due consideration to any objections interposed by any of the parties interested."

The Amended Charter of the City of Brooklyn, (N. Y. Laws of 1854, Ch. 384, title 4.)

After providing that the Common Council has control over the opening, widening and improvement of streets, etc., and that such proceedings shall be inaugurated by petition by a majority of the land owners along the line of improvement, and that notice thereof shall be published in the city newspapers, fixing a time for the hearing of the application, and if said Council pass favorably on it, they shall petition the County or Supreme Court to appoint Commissioners of estimate and assessment, who shall proceed to assess the damages and benefits and prepare a report thereof, the statute continues:

"*After their report shall be completed, it shall be by them filed in the office of the Clerk of the County of Kings. They shall then cause a notice to be published that the same has been completed and filed*, and that they will meet at a time and place specified, not less than *10* days from the first publication, to review their report. *During that time* the report may be examined by all the parties interested, and at the time and place specified any person may offer objections, in writing, to the said report. After reviewing and correcting their report, wherever necessary, they shall file it with the Clerk of said county. *The Council shall then cause notice to be published, in the corporation newspapers, that the report has been completed and filed, and that application will be made at a time specified, in behalf of said Council, to the County Court, or a special term of the Supreme Court, to confirm the report, said notice not to be less than ten days, during which time the report shall remain open to the inspection of persons interested, and, if aggrieved, they may appeal, within the said ten days, to the Supreme Court.*" The Appellate Court is given the power to refer the report back to the Com-

missioners for correction, and, when corrected, the same notice shall be published of application to confirm as with the original report, or the Court may confirm it or set it aside. (Secs. 12 and 13).

Like provisions are made and like notice by publication prescribed in proceedings for grading and paving streets. (Secs. 22–25).

Act to amend Charter of Newark, (N. J., Laws of 1857, Ch. 52, Title 7, pages 168 et. seq.)

The Common Council may appoint five freeholders to assess the benefits and costs of laying out, improving, widening streets, etc. They shall make an assessment, and file a report in writing in the office of the City Clerk. Before signing and completing the same, they shall give notice by *10 days publication in* certain *newspapers* of such depositing, to the parties interested, and also of the time and place, when their objections thereto will be heard.

On signing and completing the report, the Commissioners shall return the same to the Common Council, with any objections in writing thereto that may have been presented to them.

If any objections are so returned, the Council shall publish a notice in two newspapers to the parties interested for 10 consecutive days of time and place, when and where they will hear the report and the objections, or may correct and modify the same, etc.

Charter of the City of Lockport, (N. Y., Laws of 1873, title 387, p. 605.)

If the Common Council determines to alter, lay out, widen or straighten streets, it shall pass an ordinance, and give notice by publication in three successive numbers of the City paper, of their intention to take land for the proposed improvement, and of an application to the Supreme Court for the appointment of Commissioners of estimate and assessment.

Upon the day designated in the notice the Court will appoint Commissioners. The Charter then continues :

§ 9. "*The Common Council after the report of the Commismissioners is returned, shall give notice by publishing in three*

successive numbers of the City paper that the same will on a day specified be confirmed, unless objections to the confirmation thereof shall before that time be filed with the Clerk, or if no objections be filed the report shall, in their discretion, be confirmed by the Council." If objections are made, any person interested may be heard before the Council on a day it may appoint, and the Council may confirm or annul the report, or send it back for correction.

Charter of Passaic, (N. J. Laws, 1871, Ch. 259, p. 632, et. seq.)

The Common Council shall appoint three Commissioners of estimate and appraisement, for the laying out or widening of a street, etc.

They shall determine what lands are benefited, and assess the damages and benefits, causing a map and survey to be made, and making a report, showing the names of the owners, with the amounts assessed to each, according to the degree in which he is benefited.

SEC. 20.—All expenses and costs of proceedings for improvements in laying out, altering and widening streets shall be assessed by the three Commissioners appointed as aforesaid, and they shall report to the Common Council what proportion shall be assessed on each lot of land, accompanying the report with a map showing the lots assessed, * and *which report and map shall be filed in the office of the village Clerk, and he shall cause a printed notice of the filing to be set up in five public places near the improvement, and that the board will meet at a time and place specified not less than 20 days thereafter to consider the said assessment, and hear all objections thereto in writing.* Any assessment may be reviewed and set aside on certiorari by the Supreme Court.

Charter of the City of Chicago. (Act of March 4, 1837; 2 Ill., Laws of 1837, p. 50, 61 et seq.)

SEC. 38.—The Common Council has power to lay out, widen and alter streets, &c. Whenever a street is laid out, or widened, * the Council shall give notice by publication to owners of land of their intention to take their property, informing them

they may file a claim for damages within a specified time; if such owners file claims in that time, the Council shall choose Commissioners to assess the damages and benefits. The Commissioners shall view the premises and may in their discretion hear evidence. They shall give notice by publication of the time and place of their meeting to make the assessment. They shall then make the assessment, and shall return their report in writing to the Common Council within 30 days after their appointment. *The Council shall give two weeks notice in newspapers that on a day specified the report will be confirmed, unless objections in the meanwhile be filed.* If objections are filed, the owner may be heard before the Council, and the Council may confirm or annul the report, (and must confirm it if no objection is made), or may refer it back for correction.

The Charter as amended in 1851, contains substantially the same provisions.—(Ill. Priv. Acts of 1851, p. 151 et seq.) The notice on the filing of the report is much the same as the notice provided here.

SEC. 11.—"*The clerk shallgive 10 days notice, in the corporation paper that the assessment has been returned and on a day specified will be confirmed, unless objections to the same are made by the parties interested.*"

And, as still further amended in 1869., (Ill. Priv. Laws 1869, p. 349), it provides:

"When the assessors shall have completed their assessment * it shall be signed by the assessors and returned to the Circuit Court, and shall be filed by the clerk thereof. The assessors shall thereupon give at least ten days notice in three * daily newspapers, and by posting * of the filing of said assessment roll, and that they will on a day therein named, apply to the Circuit Court for confirmation of the same."—whereupon the Court shall hear the parties and has power to confirm, modify and set aside the report.

Charter of Bergen, New Jersey. (N. J. Laws of 1864, Ch. 264, Sec. 31, p. 418.)

"The Commissioners shall determine and report in writing to the Board of Councilmen what proportion of the expense (of opening, widening, altering and improving streets) shall be assessed to each separate lot or parcel of land, *which report * shall be filed in the office of the Clerk of the town, whereupon said Clerk shall cause to be published * for 20 days a notice of the filing of the report, and that the Councilmen will meet (at a time and place designated) to consider said assessment and to receive and consider all objections thereto which may be presented in writing.*"

Analogous provisions are made for the case of grading and curbing assessments, by Sec. 32 of the same Act.

Charter of Rochester. (N. Y. Laws 1867, Ch. 143.)

The assessors for assessing the benefits and damages resulting from a public improvement not involving the taking of lands, shall return their assessment when made to the Common Council, who "shall appoint a time at which they will hear appeals from said assessment. * *Upon such return being made and filed the Clerk of the City shall cause notice of the same being returned to his office to be published * for * ten days, and that the Common Council will on the day appointed proceed to hear appeals.* At the day appointed * they shall hear the allegations and proofs of all persons who may complain of such assessments," and may then set aside, or correct, or confirm the same.

Charter of Paterson. (N. J. Laws 1861, Ch. 121.)

The Commissioners appointed in proceedings for opening streets, &c., shall make an assessment of the damages and benefits, giving all the usual particulars, and "*shall file their report and map with the City Clerk in 90 days after their appointment, and thereupon the City Clerk shall give notice of the filing of such report and map * in one or more of the city papers, for two*

weeks." If two-thirds of the persons affected protest within a designated time thereafter, the improvement shall be discontinued; but if there is no such protest, the work shall be carried on, and *if any owner, who has remonstrated, is dissatisfied with the assessment, he may appeal to the Supreme Court, within a specified time,* and in case of such appeal, Commissioners shall be appointed, who shall review the assessment, and their report thereon shall be final.

Charter of Jersey City (N. J. Laws of 1851, pp. 392, 416, Sec. 55,) is identical in language with the Charter of Paterson.

Charter of Buffalo (N. Y. Laws of 1853, Ch. 530, p. 499).

The Commissioners appointed to assess the damages in proceedings for opening and laying out streets, &c., shall return their report to the Common Council within 30 days after their appointment.

" *The Common Council, after the report of the Commissioners is returned to them, shall give notice by publishing the same in ten successive numbers of the city paper that the same will on a day * specified * be confirmed unless objections to the confirmation thereof be * filed with the Clerk.*" If objections are filed, any person interested may be heard before the Council, and the report shall be corrected, annulled or confirmed

Charter of Albany (N. Y. Laws of 1870, Ch. 77, Title VIII).

The Board of Contract and apportionment, whose office is fixed at a designated place, shall assess expenses and benefits of street and similar improvements. When their "apportionment" is completed "*the Common Council shall cause public notice of such apportionment to be given in three * newspapers * for 30 days, during which time the said assessment and apportionment shall be open for examination by any person interested, and on the application in writing of any person aggrieved, said Board may review and correct said apportionment,*" and there

after, upon confirmation by the Council, it shall be binding and conclusive.

Charter of Utica (N. Y. Laws of 1862, Ch. 18, Secs. 92 and 93).

The Commissioners in improvement proceedings shall make their report of the assessment of damages and benefits, and return it to the common Council, and it shall be filed in the office of the City Clerk.

"*On the coming in of said report, the Common Council shall cause to be published * a daily notice * that at a time therein fixed * it will act on the same, and during which time the report will be left at the office of the City Clerk, where all persons interested may examine the same, and that unless objections are filed by some persons interested the report will be confirmed.* * * If objections are made * any person interested may be heard before the Common Council touching the matter," and the Court may order a re-reference or confirm, correct or annul the report.

The Ohio Act relating to the formation and government of Municipal Corporations, a statute of general operation throughout the State, and known as the "Municipal Code," (66 Ohio Laws 1869, pp. 145, 248), provides :

The assessment of benefits upon the lands affected "*shall be filed in the office of the Clerk of the Corporation for public inspection. Before adopting the assessment * the Council shall publish notice for three weeks consecutively, * that such assessment has been made, and that the same is on file in the office of the Clerk for the inspection and examination of any person interested therein." Any person objecting thereto shall file his objections within two weeks after such publication,* and the Council shall then appoint three freeholders as a Board of Equalization, who shall review and hear evidence on and equalize the assessment, and report it to the Council, who shall then have power to annul, confirm or modify the same.

Charter of Detroit (Mich. Laws of 1857, No. 55, p. 123).

Provides that the assessing jury shall file a report in the Clerk's office of the Recorder's Court, and that the City Attorney shall give notice by publication that the Court will hear objections to its confirmation at a time specified, and that thereupon it may be confirmed, &c.

An Act in relation to construction of drains, dikes and levees. (Indiana Laws of 1869, p. 84, Ch. 38.)

The appraisers shall return their schedule and assessment to the Secretary of the Drainage Company, "who shall cause it to be filed for record in the office of the Recorder of the County. * *Upon filing such schedule for record the Secretary shall give notice thereof by posting, * and any party aggrieved by any such assessment may, within thirty days thereafter, appeal to the Circuit or Common Pleas Court.*"

The above is a statute of general operation in Indiana.

An Act relating to drains, ditches and levees, approved May 29th, 1879. (Ill. Laws of 1879. Cited in *Blake* vs. *The People*, 109 Ill.)

The Commissioners shall make an appraisement of the benefits and costs resulting from the improvement, and file it with the Clerk of the Court appointing them. Upon being filed with such Clerk he shall give three weeks notice by publication, stating the time of the filing, and when application will be made for its confirmation, at which time all persons interested may appear and contest the confirmation or show that the report ought in any respect be modified, producing the appropriate evidence in support thereof. If, after hearing all objections, the Court is satisfied that the report ought to be approved, it shall cause an order of confirmation to be entered.

A system of procedure for the review and confirmation of the Commissioners' report, similiar in its main features to the above, is likewise provided for in the Illinois General Act in relation to cities, villages and towns.

4. It is urged that the statute does not afford due notice because the notice is too brief.

The learned Counsel say, "the time was so limited within which a property owner would apply for relief," and add, "we think we are safe in saying that this is the shortest statute of limitation in the history of legislation."

An examination of the following cases and statutes will demonstrate the utter groundlessness of the learned Counsel's contention.

The People vs. *The Mayor of Brooklyn*, 4 N. Y., 419.

This was an application to quash on certiorari an assessment imposed on certain lands in the City of Brooklyn, benefited by the grading and paving of Flushing Avenue. The City Charter provides that the assessment shall be delivered by the Assessor to the Clerk of the Common Council, who shall give public notice in the Corporation newspapers, that the same has been so left with him, and that the Common Council will,

on a certain day therein stated, which shall not be less than 10 days from the first publication of the notice, proceed to confirm the assessment. During that period any person interested may appeal from the same to the Common Council, who may determine such appeal, and alter the assessment in their judgment.

The Court said: "Another objection is, that no notice was given to the owners of said assessment. In the case of *The Owners of Ground* vs. *The Mayor*, 15 Wend, 374, it was adjudged that the Legislature had authority to prescribe what notice should be given in the case of an assessment like the present, and if notice be given as thus required it is sufficient. The only notice required by the statute under which the present assessment was made, is a notice to be published in the corporation newspapers for *ten* days before the day fixed for the alteration or confirmation of the assessment by the Common Council. This gives to any person assessed an opportunity to be heard, and is all the notice necessary."

Scott vs. *Brackett*, 89 Ind., 413.

Application to set aside an assessment for drainage purposes on certain lands, and for leave to remonstrate against the Commissioners' report. The statute under which the assessment was levied provided that upon the Commissioners of drainage making their report to the Court, *three days* shall be allowed to any owner of lands affected by the work proposed to remonstrate againt the report for various reasons specified.

The petitioners insisted that the act is unconstitutional on the ground, among others, that "the notice is unreasonable and only colorable."

Said the Court: "The objection is not supported by any authority and we are of opinion that it is not well taken; similar notices in many analagous proceedings have been prescribed, and such acts have not heretofore, for such reason, been deemed invalid. The notice required may not bring actual knowledge of the proceedings to those interested, but the act cannot for that reason, be deemed unconstitutional."

Blake vs. *People*, 109 Ill., 505, 527.

The Court said: "As to proceedings to charge lands with the amount of special assessments, no particular kind or length of time of notice is prescribed by the constitution, and it is not perceived why *one week's* notice by publication, might not have been sufficient."

The City of Ottowa vs. *Macy*, 20 Ill., 413, 420.

In this case, the facts of which have been previously given, the Court said:

"The fifth objection, to which counsel has called the attention of the Court is, * that the City Clerk did not give sufficient notice of the time and place of hearing objections to the confirmations of the assessment by the City Council."

The sixth section of article 8 of the City Charter, provides: "That upon the return of the Commissioner's assessment to the City Clerk, he shall cause a notice to be published in one or more newspapers published in said city for *six days*, to all persons interested therein, of the completion of the assessment and the filing of the roll. Time and place shall be designated for hearing objections." Under this provision and under those of the city ordinance passed in pursuance thereof, the Clerk on the 8th of August, 1857, published six days notice of the return of the assessment, and fixing the 18th of August, of the same year—10 days thence, as the date of confirmation.

The Court continuing at page 422, said:

"We see no force in the objections made to rendering judgment against the lots assessed."

Hays vs. *Tippy*, 91 Ind., 102, 106.

Application to set aside the report of Commissioners appointed to assess the damages and benefits resulting from the drainage of certain lands and for leave to enter objections against the same. The statute under which the assessment was made provided that: "Upon the making of the report of the Commissioners to the Court, *three days* shall be allowed to any owner of lands affected by the work proposed, to remonstrate against the report."

"The * point made by * counsel in argument," said the Court, "is * * that that portion of Sec. 4 of the Drainage Act of 1881, (Sec. 4276, R. S., 1881,) providing that but *three* days shall be allowed by the Court, in which an owner of lands affected by the construction of the drain, may remonstrate, is unconstitutional. The learned counsel has not referred us to any clause or section of the constitutions, State or Federal, to which it can be said that this provision of the statute is clearly repugnant, and we know of none. * * The time given for remonstrating is short, and the provision may seem therefore, unreasonable and oppressive, but this will not authorize the courts to declare it unconstitutional. * The only remedy for such a defect in the statute, is by appeal to the law-making power."

5. It is contended, finally, that the statute does not provide for giving the parties interested notice of the proceedings to be had in the County Court upon and after objection of any party aggrieved.

The contention, upon this point, if I understand it, is that, whenever an aggrieved party proceeds in the County Court, all the other parties on the roll are interested in the proceedings, and should, there-

fore, be notified of the time and place, when and where the particular matter or objection will be heard.

To this I answer that:

First.—Without questioning, at present, the soundness of the premises of the argument, it is sufficient to say that the notice given under section 8 of the Act, is a notice of the pendency of the proceedings which are ultimately to result in the confirmation of the report; that, from that time on, the parties in interest are charged with notice of every thing done, and every step taken in the County Court; and that no other or further notice than this is needful.

The precise objection made by plaintiffs on this point has been long since made, and long since and uniformly overruled. It was first urged in *Patterson* vs. *The Mayor, Etc.*, 1 Paige Ch. 114. In declaring it untenable, Chancellor Walwoth said:

"The alleged irregularity is that the Commissioners altered the assessment, and reduced the amount allowed to the complainant, without any written objections being put in by him, and without notice to the complainant to appear and oppose. On looking into the statute under which those proceedings were had, I am inclined to believe it was not intended by the Legislature that any further notice should be given than the one which was published in this case. In the assessment and appraisal of damages in these street cases, what is allowed to that class of persons whose property is taken for the improvement, is to be levied upon another class whose property is supposed to be benefited thereby. The necesessary result of this is, that

if anyone objects to the amount allowed to or assessed upon himself, the Commissioners cannot alter that allowance or assessment without making a corresponding change in relation to some or all of the others. The statute directs the deposit of the copy of the report, and public notice thereof to be given in the newspapers and of the time and place of presenting the report to the Supreme Court for confirmation. If any person is dissatisfied, he may within ten days make his objections in writing to the Commissioners, and, if objections are made, they must review the assessment before presenting it to the Court. The Legislature never could have contemplated the deposit of a new copy, and a new notice to propose objections as often as the Commissioners reviewed their assessment. Such a construction of the Act would be productive of great and unnecessary delay, and would be inconsistent with the provision which directs the notice of presenting the report to the Court to be given at the same time with the notice of the depositing the copy for inspection, that objections in writing may be made thereto. *The notice to propose objections to the report is a sufficient notice to those who are dissatisfied with the original report, to appear before the Commissioners and oppose any alterations which may be proposed by the persons objecting. At the expiration of ten days they can apply to the Commissioners and ascertain whether any objections are made, and they will then be at liberty to be heard in opposition thereto.* If the Commissioners decide in favor of the objections, the original notice points out the time and place for the person aggrieved thereby to appear before the Supreme Court, and oppose the adoption of such amended report."

Chamberlain vs. *Cleveland*, 34 Ohio, St. 551. 570.

The Statute under consideration in this case provided:

That in all cases in which it was determined by the Common Council to assess the cost of an improvement upon abutting property, the board might appoint disinterested freeholders, to report

*an estimated assessment of the benefits, which assessment should be filed in the office of the clerk of the corporation for inspection. That before adopting the assessment, the Council should publish notice for three consecutive weeks, in a newspaper of general circulation, that the assessment had been made and that the same was on file in the office of the clerk for the inspection of interested parties. That any person interested should file his objections with the clerk within two weeks after the expiration of such notice, and thereupon the Council should appoint three disinterested freeholders to act as an equalizing board, * * that on a day appointed by the Council such equalizing board should hear evidence on said assessment, and equalize the same; they should then report the equalized assessment to the Council, who had power to confirm, set aside, or alter the same; that the confirmation by the Council should be conclusive. 66 Ohio Laws, p. 248, (1869.)*

The Court said: "It is objected by the plaintiff that the equalized assessment is void, on the ground that no notice was given of the time the Board of Equalization would proceed with the equalizing of the assessment, nor was any notice given of the filing of the same with the clerk or Council. We do not think this objection well taken. By the provisions of Section 585, before adopting the assessment made by the Assessing Board, the Council is required to publish notice for three consecutive weeks that such assessment has been made, and that the same is on file in the office of the clerk, for the inspection and examination of any person interested therein. * * * We think that after the notice required has been given, all persons interested have a reasonable opportunity to be heard against the assessment, and *that, from this point, the proceeding must be regarded as pending, and that all persons interested are bound to take notice of what is done up to the time the equalized assessment is confirmed.*"

Gilbert vs. *City of New Haven*, 39 Conn. 467.

In proceedings for widening West Water street in New Haven, the matter of assessing benefits and damages was, under the provisions of the

Charter, and in pursuance of an order of the Common Council referred to the Board of Compensation, who made a report to the Council, which was rejected and a recommittal ordered; the board thereafter revised their former assessments and made a new report, raising the amount of certain assessments, which report was thereafter accepted by the board, and the assessments laid accordingly. It was conceded that but one notice was given to the appellant by the Board of Compensation, viz: a notice of the first order of reference by the Council, and that no notice was given of the recommittal, or second order of reference, nor was he present at any meeting of the board after such second order, or heard in reference thereto at the hearing at which the assessment was made, nor was he present nor did he have a hearing at the meeting of the Council approving the corrected report. The Court below overruled his objection that the assessments were irregular and void in consequence, holding that but one notice was required, viz: the notice given of the first order of reference.

Said the Appellate Court (Carpenter J.):

"It is * objected that the appellant had no notice of the recommittal, and of the subsequent proceedings. We are satisfied that none was required. *The whole matter from the time of its first reference to the Board of Compensation to the time the report was finally adopted by the Court of Common Council, was one*

proceeding. The appellant was notified in the first instance and appeared. If he neglected to attend the subsequent stages of the proceeding it affords him no ground of complaint now"

Gillett vs. *The Treasurer*, 30 Kas. 166.

The Court said: "Sec. 43, Ch. 107 General Statutes constituted the Board of Equalization. * The time of meeting of that board was fixed by Statute, and notice of the time of the meeting was also required to be published, so it was held that, given power to equalize, the time of meeting prescribed, as well as publication of the notice of the time of meeting, the board without further and special notice had power to change the assessment of real estate by either raising or lowering."

Gates vs. *Brooks*, 59 Iowa, 510, 513.

Said the Court: "The Statute (in relation to the settlement of boundaries between contiguous land owners) provides in substance that, where the owner of land cannot agree with the owner of adjacent land, in regard to the boundary line between the tracts, he may cause a notice to be served on the owner of the adjacent land that on a day named he will apply to the District Court for the appointment of a commission of one or more surveyors to survey and establish the boundary line. The Statute also provides that on the day named, if a proper petition and proof of due notice have been filed in the District Court, the Court shall appoint a commission of one or more surveyors who shall survey the boundary line, and make a report of their doings, accompanied by a plat, and notes of the survey.

"The Statute also provides that the commission may take evidence and incorporate the same with their survey; and that upon the filing of the report, any person adversely interested may enter objections to it, and the Court shall hear and determine the same, and shall approve or reject the report, or modify it as it shall see fit, and enter judgment accordingly. The defendants contend that the Statute is in conflict with Sec. 9, Art I of the constitution, which provides that 'no person shall be deprived of life, liberty or property without due process of law,, and insist that they have been so deprived."

* * * "We cannot properly hold the Statute unconstitutional."

Avery vs. *East Saginaw*, 44 Mich., 587, 591. (Marston, J.):

"The Charter of East Saginaw provides for a Board of Review (in tax proceeeings,) and specifies the duties thereof, among which is the right to increase the valuation of any property found in said roll. The Common Council is to appoint the time and place where said board shall meet, and the charter requires that notice thereof 'shall be given by the Clerk of the Common Council at least ten days prior to the time of meeting, by publishing a notice thereof in the official newspaper published in said city, and also by posting the same in three different public places in each ward of said city.' I concede the correctness of the doctrine that no changes can be made by the board without notice to the person against whose interest such change is made, and an opportunity given him to show cause why no such change should be made, but in my opinion, the general notice given by the Clerk is all that is necessary, and that no formal or special notice beyond this is required. * * * * I can see but little, if any, object in giving the general notice required by the charter, if in addition thereto, special notice must also be given in cases like the present. Under the general notice parties must attend the meetings of the board as they would the sessions of a Court, until their assessment is passed upon, and when once this is done, no change could afterwards be made without special notice within the case of *Griswold* vs. *Bay City*, 24 Mich., 262. This may be an inconvenience to the tax payer, but it is one for the Legislature to remedy."

Secondly.—The objections which, under any construction that may be given to the statute can be made to the report, so far as they may affect others than the party complaining, cannot by any possibility exceed the following:

a. An objection by a land-owner, whose property has been taken or damaged, that his award is too low, and asking to have it increased.

b. An objection by a land-owner, whose property has been benefited, that his assessment is too high, and asking to have it lowered.

c. An objection by a land-owner, whose land is subject to be burdened with the cost, that a certain award of damages to another person is too high, or a cerain assessment of benefits to another person is too low.

d. An objection by any person in interest, that the proceedings are irregular or void, and praying that the whole report be refused approval or confirmation.

The question here arises : When a petition presenting any of the objections above set forth is filed, and the Board have taken issue thereon, is there any means of giving notice of that proceeding to the property-holders of the district, affording them a hearing therein ? And is there any constitutional necessity for giving them such notice and hearing ?

The ground upon which these questions are asked, is, as I understand it, this : First, if an award of damages is increased, the burden upon the assessed district is proportionally increased ; and, therefore, every property-holder in the district

has a right to be notified of the proceeding, and to be heard therein. Secondly, if the assessment of benefits of any one property-holder is lowered, the burden upon the other property-holders of the district is proportionally increased; and therefore, every property-holder in the district has a right to a hearing on that point. Thirdly, if it is sought to lower the award of damages, or to raise the assessments of benefits of any one person, he is entitled to be notified and heard in the proceeding, which diminishes his individual compensation, or increases his individual burden. Fourthly, if an attempt is made to dismiss the whole proceeding in the County Court, the property-holders, who have an interest in having the improvement made, are entitled to be notified and heard.

I shall endeavor to answer these propositions in the order in which I have stated them.

a. If it is urged that, whenever a person petitions to have his award of damages for property taken or injured increased, every property-holder in the assessing district must be notified, and is entitled to be heard. For the present, grant it. The learned counsel for the plaintiffs contend that the notice must be personal. Grant this, also. With these principles established, let us note the result. There are, we will say, five hundred persons to whom awards of damages have been made,

and there are two thousand property-holders, upon whose land assessments for benefits have been laid. One of these first files his petition to have his award raised, say from $5000 to $10,000. We are now told that every one of the two thousand assessed persons of the district must be notified—personally notified—of this proceeding. In compliance with this, a summons, bearing the greeting of the sovereign people of California to each of the two thousand by name, issues from the County Court. The sheriff may possibly find these two thousand persons in the State, and serve them. I will assume that he does so. I will then suppose that the same proceedings are taken with reference to the five hundred claimants of damages. The day of trial comes, and these two thousand property-holders appear in Court, each by his own attorney. The proceedings now go forward, with the petitioners' attorneys on one side, and the attorney of the Board and the two thousand attorneys of the land-holders on the other. It is answered that this *reductio ad absurdum* cannot happen. I ask, why not? Because, it is said, it is not presumable that each and every property-holder will appear. But, by what right is it presumed that he will not? Why does the constitution require, as it is claimed, that they should be notified? Because, they have an interest, we are told. Why does the constitution guarantee them,

as it is claimed, a hearing? In order to protect their interests, we are told. Does the law which requires notice and guarantees a hearing presume, at the same time, that the notice will be unheeded and the hearing unavailed of? On the contrary, the law summons parties into Court, presuming that they will come. It promises to hear them, presuming that they will speak.

The operation of this rule may be carried still further. The award of damages by the Board, and its confirmation by the County Court, amount to a condemnation for a public use of the property taken. The assessed district must pay that award in the shape of an annual tax. As the burden of the tax will be in proportion to the award, we are told that the tax-payers of the district have a right to be heard in a proceeding which, by determining the amount of the award, fixes the extent of their burden. Now, suppose that the statute had made the assessment district commensurate with the city; in other words, that it had enacted that the cost of opening Dupont Street should be borne by the property of the whole municipality; applying the principles contended for, it would be necessary to give to each of the fifty thousand tax-payers of the city individual notice and opportunity to be heard. According to the constitutional rules contended for, this result would be inevitable.

Go one step further. The State of California institutes proceedings to condemn lands for a prison, an asylum, a capitol, or any other public work. The whole property of the State must pay the cost in the shape of a tax. Each tax-payer is, of course, interested in the proceedings for condemnation; for his burden of taxation will be in proportion to the award made. According to the principles contended for, each tax-payer in the State must be individually notified of the condemnation proceedings, and be afforded an opportunity to be heard therein.

These are the legitimate and unavoidable results of the constitutional guarantees, so much invoked in this cause. Here are proceedings constructed upon sound constitutional principles, as expounded by the learned counsel for plaintiffs. Every wheel, every belt, every shaft, every cog of the machine is upon the most approved pattern. It is constitutionally perfect, in the whole and in every part. It has only one drawback: it will not work. This, of course, is a very slight objection to those who talk so eloquently about "Runymede" and "Magna Charta" and the "great swelling words of liberty which have been thundered into the ears of tyrants by our English speaking race"; but, still, it cannot but be admitted that it is an objection.

I may be asked: Do you mean to deny that no person can have his property taken from him, either directly or by assessment, without being notified, and, if he wishes, heard? No, I do not mean to deny it. But, I do mean to deny that this right to protect his property must, in all cases and under all circumstances, be exercised by him individually, and cannot be exercised by representation. I do mean to assert that, in the determination of what shall or shall not be a public charge, and the amount of that charge, the public must, of necessity, act and be represented and heard through public agents; and each individual member of the community cannot, from the very nature of the case, personally appear and be individually heard. The right to be notified and heard is not denied, though its exercise be not granted to each person individually; the right is exercised by each, in the only way that it can be exercised, when all appear collectively by their agent and representative, legally constituted and appointed for that purpose.

For instance: when the State institutes condemnation proceedings, the cost of which is to fall upon every taxpayer of the State, each taxpayer is unquestionably interested in having the cost reduced to a minimum; and, as his property is to be burdened with the cost, he has a right to

be heard in the proceeding. But, as the nature of the case makes it impossible for each to be heard individually, the right, like all other rights which are common to the whole people of the State, must be exercised by representation. The officers of the State, conducting the proceedings, represent all the taxpayers of the State. Through them, each and every taxpayer is heard and protected. So, where the City is condemning lands for a street or any other public use, where the cost is to be borne by the whole City, the officials constituted by law to conduct the proceeding represent therein each and every taxpayer in the City, and protect and enforce the right of each to have the common burden made as light as may be. The same is true, where the cost is to fall upon a more restricted district than the whole City. The legally constituted agents authorized to represent and act for the district do represent it and act for it in all matters which are common to the whole district. The individual property-holder in the district is entitled to be individually heard in all matters which affect him individually as distinguished from the rest; but, where his interest is common with that of all the other members of the district, all must be represented and act in common. And that can only be done through the public agents authorized to act and speak for the common cause.

In this case, for instance, when a person filed his petition to have his award of damages increased, he was obliged to cite the Board to appear and answer. When the Board so appeared, the antagonistic interests of the contest were brought face to face—the individual, representing himself alone, seeking to have his individual compensation increased, the Board, representing the common interest of the district, seeking to have it reduced to a minimum. Thus, both sides were represented and heard in the only way in which, in the nature of things, they could be.

People vs. *Smith*, 21 N. Y., 595., was a certiorari to review the order of a County Judge, setting aside an order of the Commissioners of Highways of the town of Riverhead, on Long Island, refusing to lay out a highway. The statute under consideration provided that "the Commissioners have power to lay out new roads, without the consent of the owners of the land through which they may run, upon the petition of twelve freeholders." Nothing is said as to their giving notice to anyone of the hearing of the application before them. Every person conceiving himself aggrieved by a determination of the commissioners, either in laying out, or refusing to lay out, a highway, may appeal to three judges of the Court of Common Pleas, or, under the present

Constitution, to the County Judge. Where the determination appealed from is against an application for laying out a road, the judge is to give notice of the time and place of hearing the appeal *to the Commissioners by whom such determination was made*, and the proofs and allegations of the parties are then to be heard.

"It will be thus seen," said Denio, J., p. 597, "that the only notice which the statute requires to be given, in a case like the present, is of the time and place of hearing the appeal, and that such notice is only required to be given to the Commissioners who made the order appealed from."

The sole error relied on was that no notice of the proceedings on the appeal were served on the relators, who were interested parties, and no notice of the hearing before the County Judge.

By the Court (p. 599):

"The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the Legislature shall, in its discretion, prescribe. In the case before us, the Act declares that the Judge shall give notice to the *Commissioners of Highways whose order is appealed from*, and it is silent as to notice to any other person. The appellants and the Commissioners are the only parties who are required to be convened on the hearing before the Judge, or to have notice of that hearing, and it is their proofs and allegations only which the judge is obliged to hear. *It was doubtless considered that the Commissioners, who had officially decided against the act which the appellants were seeking to promote, would sufficiently represent the views on that side of the question.*"

Burnham vs. *Goffstown*, 50 N. H.. 560, 563.

To proceedings for laying out a highway and

apportioning the expense thereof between two towns, one Cheney, a taxpayer of one of the towns, after the order laying out had been made, interposed an objection that the appointment of the Commissioners was not authorized by law, and that they had made a mistake in apportioning the expense of the road to the towns. When the Commissioners were appointed, the towns were present by counsel, and did not object. Said the Court:

"Mr. Cheney, who seeks to come in as a taxpayer, has no right to appear and no claim to be heard, either in Court or before the Commissioners, except as one of the public. *His interest is too remote; he is represented, as are all other taxpayers in the town, by the town, which is the body, the aggregation of all the taxpayers and voters and citizens who reside in it. The town is represented here, and that is all the representation to which the taxpayers as such are entitled.*"

I conclude, therefore, that, in the first case supposed, where a person sought to have his award increased, the right of the property-holders of the district to be notified and heard was exercised through their representatives, the Board of Commissioners, and that there was no constitutional necessity for notifying and hearing each of them personally and individually.

b. It is next urged that, whenever a land-holder whose property has been benefited complains that his assessment is too high and asks to have it

lowered, every other land-holder in the district is entitled to be notified and heard, because the lowering of any one assessment necessarily increases all the others.

The answer which I have given to the first objection is applicable here. The whole district has a common interest in resisting an application to lower an assessment. That common interest is represented by the Board of Commissioners, who must be notified of the application, and may appear in Court and resist it. The right of each taxpayer to be notified and heard in the common cause, is exercised through these legally appointed representatives. So far as I have been able to ascertain, it has never been the practice in any statute, which gives any party aggrieved the right to apply to have his own assessment reduced, to make the other parties to the assessment, parties individuaily to that particular proceeding. Take it in the case of general taxation: A taxpayer applies to the County Board of Equalization to have his assessment reduced. The Board appoint a time to hear his application. The Statute does not provide for giving to the taxpayers of the county, individual notice of that proceeding. And yet, in a certain sense, every taxpayer in the county has an interest in the matter, for, in proportion as each assessment is diminished, the *rate*

of taxation necessary to raise the requisite revenue must, proportionally, be increased.

Again: The State Board of Equalization may raise the assessment of any County in this State. "When they raise it in any County, they necessarily raise it on the property of every individual who owns any in that County. Must each of them have notice and a separate hearing? * * * If this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main functions of this Board impossible." [1]

Again: In Swamp Land Reclamation Districts, each land-holder may resist in Court the collection of his assessment, urging that it is excessive. If all the other land-holders in the district have paid their assessment to the County Treasurer, they are, of course, interested in defeating this resistance; for, if the defense is successful, the burdens upon the rest will be proportionally increased, since, if the original assessment turn out insufficient, the Supervisors may order additional assessments.[2] Yet, the Statute provides no machinery for bringing anyone into Court, except the immediate party to the action.

The reasons which I have hereinabove given, obtain here. When an individual applies to the

[1] State R. R. Tax Cases, 92 U. S., 609.

[2] Hager *vs.* Reclamation Dist., 111 U. S.

County Board of Equalization to have his assessment lowered, the interest of the other taxpayers of the County to resist him is common to them all. That right they cannot be individually notified of, in every given instance, nor can they each individually exercise it. They must exercise it by delegation and representation. They do exercise it, and receive the full protection of it through their authorized representatives, the Board itself. So, in the case of the Swamp land district. The district, which brings the action against the delinquent, represents each and every individual taxpayer of the district, in that which is of common interest to them all—the collection of a tax which goes into the common fund. Each and every right which is common to all the taxpayers of the district, is represented and enforced by the agents of all—the plaintiffs in the action.

I conclude, therefore, that, in a proceeding by an individual proprty-holder in the district, to have his assessment of benefits reduced, the other land-holders of the district have no right to be individually notified or heard.

c. It is next urged, that, where a person in interest applies to have an award of damages made to another lowered, or an assessment made against another raised, the person thus attacked is entitled to be notified and heard.

If such a proceeding as is here contemplated can, under the statute, be taken and entertained, I would not deny that the person thus adversely moved upon should be notified and heard; for, this is an attack upon him individually, affecting an interest peculiar to himself, and not common to him and the rest of the district, and in which, therefore, the Board do not represent him. But I answer:

The statute permits no such proceedings; nor is it, under the Constitution, required to do so. The Constitution does not guarantee to any person the right to be heard in fixing the assessment of any other person, or the amount awarded him for property taken or damaged in the exercise of the right of eminent domain. In that he has no individual interest. His interest is common with that of all the others of his class. If the assessment is too low, it does affect him in making his own burden proportionately greater; but it affects all the other taxpayers in the same way. If the award is too high, it does affect him in making his share of the payment proportionately greater; but it affects all others who are to pay in the same way. In either event, the interest being common to all, it must be represented by all, and is represented by the public agents who make the assessment or award the damages. To hold otherwise, would be to give every taxpayer in the community a con-

stitutional right to contest every assessment upon the tax roll, and to be made a party to every condemnation proceeding.

Nor does the statute require it. It gives the right to appear to a person "feeling himself aggrieved by the action or determination of said Board," to set forth his objections. But, that grievance must be one personal to himself, one in which he has a direct, not a remote interest.

The principle is recognized in the case of *Fagan* vs. *City of Chicago*, 84 Ill., 227, 235, where it was said:

"We see no objections to the Court below confining the examination of the witnesses to a comparison of the assessments objected to on a particular lot, with the general assessment against all of the other lots. The question being tried was what proportion the assessment on the particular lot bore to the assessment imposed on all of the other lots, and not as to that on another specified lot. It was, whether the particular lot was over or under assessed in proportion to the general assessment. It would seem, that no person could imagine that if it could be shown that of perhaps a thousand lots, assessed in this case, one was rated too low, the whole assessment should be held invalid. To so hold, would be to thwart the purpose the General Assembly had in view when this enactment was adopted. Nor, would it be practicable to permit each attorney representing each objector, to examine every witness, so as to compare the assessment of the lot for which objections were filed, with every other lot assessed."

Also in *Clapp* vs. *Hartford*, 35 Conn., 66, 76, where the Court said:

"In making the apportionment (of the assessment) however, it may sometimes happen that injustice will be done to one or more individuals. The remedy is by appeal to the Judge of the

Superior Court. The obvious import of the charter is, that the appeal carries up, not the whole apportionment, but simply the apportionment to the appellant. The appeal is allowed 'to any person aggrieved,' and notice must be served upon the City Clerk. The city and not the other persons benefited, is the adverse party. If the Legislature had intended that there should be a general re-apportionment upon the appeal, it is fair to presume that provision would have been made for notifying the others interested, as they would, in that event, seem to have a greater interest in the question than the city. Indeed, the city would hardly be interested at all, as it would be immaterial to it who paid the assessment, or in what proportion it was paid. The fact that the charter makes the city the only appellee, is sufficient evidence of an intent that the appeal should not disturb the assessment upon others, and that the Appellate Court should be limited to re-assessing benefits to the appellant. In this view of the case, it is apparent that the charter must have contemplated a reduction of the assessment upon the appellant, and a consequent reduction of the whole sum assessed, otherwise the appeal could be of no benefit to the party aggrieved."

But if it were true that both the Constitution and the statute give a person the right to object to the report in the respects above pointed out, then the law does provide the machinery for giving notice and a hearing to the person whose assessment or award is thus attacked.

If the statute contemplates that the award made to A by the report may, upon petition of B, be raised by the County Court, and the Court cannot constitutionally thus raise it, without giving A notice and an opportunity to be heard (and I admit it cannot), then the statute contemplates—even though it may not, in terms, so provide—that the

Court shall have power to give A appropriate notice and hearing.

In a case in Connecticut,[1] where the statute provided that any Judge of the Superior Court might, upon the application of one partner, appoint a receiver, to hold and dispose of the estate of the partnership, the Court held that such an appointment could not be made without notifying the other partners and giving them an opportunity to be heard. The Court said:

"A receiver was appointed forthwith upon the application. No notice whatever of the proceeding was given to the adverse party in interest prior to the appointment. * * * We must hold this law to be a nullity, if it authorizes such proceedings."

Now, the statute did not, in terms, require notice, but the Court held that it must be implied that, since notice was necessary, the Legislature intended that notice should be given, and that the Court had power to give it. The Court said:

"It is true that the statute does not, in terms, require notice to be given, but * * * we cannot suppose that such powers should be exercised without notice, without the knowledge even of those most interested. * * * We prefer, certainly, rather to give it such a construction as to require notice to parties interested."

The Court reversed the order appointing the receiver, on the ground "that there was no notice to the adverse party."

The same doctrine is laid down in the case of

[1] Bostwick *vs.* Isbell, 41 Conn., 305.

Wilson vs *Karle*, 42 N. J., 612, 613; where it was said:

"There can be no doubt, that, in all such cases," (where a special body, such as commissioners of estimate and assessment, qualified to perform a quasi judical function, are authorized to decide some matters affecting pecuniary interests,) "the persons whose interests are to be passed upon, should have the offer of a hearing, for this is one of the dictates of natural justice. So entirely is this the case, that whenever a statute has empowered such judical acts to be performed, and has been silent with respect to a notification to the persons interested, the necessity to give such citation has invariably been imported in such legislation by judicial intendment. There are a number of decisions in this State maintaining in emphatic terms, this doctrine."

So, also, in the late decision of the Supreme Court of the United States in the Kentucky Railroad Tax Cases, 115 U. S., 321, 334. There the assessment of the railroads was brought for review before a Board of Railroad Commissioners, who sat as a Board of Equalization and corrected and equalized the valuations. It was urged that no hearing was accorded the railroad companies by *the statute*, under which the taxes were levied, and that it was hence unconstitutional as depriving them of their property without due process of law. But, the Court said:

"If the plaintiffs in error have the constitutional right to such hearing, for which they contend, the statute is properly to be construed so as to recognize and respect it, and not to deny it. The Constitution and the statute will be construed together as one law. This was the principle of construction applied by this Court, following the decisions of the State Court in *Veal* vs. *Delaware* 103, N. S., 370, where words, denying the right, were regarded as striken out of the State Constitution and statutes

by the controlling language of the Constitution of the United States. And in the case of *Cooper* vs. *The Wandsworth Board of Works*, 14 C. B. U. S., 180, in a case where a hearing was deemed essential, it was said by Byles J., that 'although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature'"

If it be conceded, in this case, that the County Court has power—juris liction—to raise the assessment or lower the award of any person on the application of another, and that this power cannot be rightfully, constitutionally exercised without giving the person attacked notice and a hearing, then the law (though this particular statute be silent on the subject) gives the Court the power to give appropriate notice and hearing. In this State, "when jurisdiction is, by any statute, conferred on a Court, all the means necessary to carry it into effect are also given; and, in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by the statute, any suitable *process* or mode of proceeding may be adopted which may appear most conformable to the spirit of the Code of Civil Procedure."[1]

This provision has been frequently applied where a law conferred a jurisdiction, but provided no manner of exercising it.[2]

[1] C. C. P., Sec. 18.

[2] Mawson *vs.* Mawson, 50 Cal., 539.
Estate of McCauley, Id., 544.
Thompson *vs.* White, 63 Cal., 505.

I conclude, thetefore, first, that the Constitution does not require, and the statute does not grant, the right to one land-holder in the district to attack, individually, the assessment or award made to any other land-holder; and, secondly, if it does, the law provides that the Court may, by appropriate process, bring the party thus attacked into Court.

d. If any person in interest should petition the Court to dismiss the whole proceeding, on the ground of want of jurisdiction, or for fraud, or any other cause, must all the other persons in the district be individually notified? If the principles which I have hereinabove sought to maintain are sound, it is clear that they need not. It is evident that, in resisting an attack of this kind, the Board of Commissioners represent the common interest of the whole district.

I submit, therefore, that notice is provided for every possible contingency, and that the objection of the plaintiffs, that the statute is unconstitutional, because it does not afford the parties in interest the notice to which they are entitled, is untenable.

The opinion of Mr. Justice McKee, in *Mulligan* vs. *Smith*, is quoted at length as "showing conclusively that the notice provided for was not due notice or due 'process of law.'"

As I understand that opinion, it is not a decision that the twenty days' notice, required by section seven, is not a sufficient notice of a hearing before the County Court, but simply that the taxpayer never had notice, nor an opportunity to be heard anywhere, upon the question of the sufficiency of the petition presented to the Mayor, and, consequently, could not be bound by any adjudication determining the petition to be sufficient. Nowhere in the opinions delivered, either by the learned Justice, nor by Justices. Sharpstein or Ross, do I find it stated that, if a proper petition had been presented to the Mayor, the notice provided by section seven would not have been due notice to the taxpayer.

There is no doubt that Mr. Justice McKinstry does so decide, citing *Stuart* vs. *Palmer*, 74 N. Y., 183; *Murray's Lessee* vs. *Hoboken*, 18 How., 272; Cooley on Tax., 266.

The first two decisions do no more than recognize the general rule, that, in proper cases, notice must be given.

The passage in Cooley reads:

"It is not customary to provide that the tax-payer shall be heard before the assessment is made, but a hearing is given afterwards, either before the Assessors themselves, or before some Court or Board of Review. And of the *meeting* of that Court or Board, the tax-payer must, in some manner, be informed, *either* by personal notice or *by some general notice which is*

reasonably certain to reach him; or, which is equivalent, by some general law which fixes the time and place of meeting, and of which he must take notice."

The general notice which the learned author is here speaking of is, doubtless, a published notice, such as is provided for in the present statute. Such a notice is sufficient process to subject the party to the action of the Court, provided it fixes the time and place of the meeting of the Court, or the time and place are fixed by some general law.

Apply these principles to the present case: The tribunal before which the tax-payer is authorized by the law to appear is the County Court. The time and place of the meeting of that Court are fixed by general law. The time in which the tax-payer may appear and file his petition for relief in the Court, is thirty days from the first publication of a "general notice which is reasonable certain to reach him." Of course, after the taxpayer has filed his petition, he becomes a litigant in Court, and, like any other litigant, must give heed to the calendar of the Court, in order to learn when his cause comes on for hearing.

I humbly submit that the process afforded by the statute is entirely in accord with the doctrine of the foregoing passage of Cooley.

III. The Hearing Provided by the Statute is Sufficient to Satisfy Every Constitutional Requirement.

1. It is urged that the parties in interest had a constitutional right to be heard upon the question whether the improvement should be made or not. It is claimed that proceedings for the widening or opening of streets, where private property is to be condemned for a public use and the cost is to be laid upon a given assessment district, are judicial in their character and can not be inaugurated without giving the persons whose property is to be taken, or made to bear the burden an opportunity to be heard upon the question. It is insisted that, the Dupont Street Act gives no opportunity for such hearing and is, therefore, unconstitutional.

To this there are two answers:

First.—The parties have no constitutional right to be heard upon the question of the propriety or advisability of making the improvement. That question is not, in that sense, a judicial question.

This proposition has been established by abundant authority:

Pearson vs. *Lable*, 78 Ky., 170, 173, was an action to recover the amount apportioned against certain property benefited by a street improvement. The defendants urged that the property received no benefit.

Said the Court: "Whether the property within the tax district, considered as an entirety, will be benefited by the proposed improvement is a question to be decided primarily by the Legislature. And when that department, whether acting directly or through the local authorities, to which it may have delegated the power to determine when such improvements shall be made, directs an improvement to be made, and the cost of making it to be assessed upon adjacent property, there is a decision by the Legislature that the property within the district will be benefited This decision will generally be final and conclusive upon the question of benefits to the district as a whole, and also *that public convenience demands that the improvement be made.*"

In matter of Zborowski, 68 N. Y., 88, 97, which was an application to vacate an assessment for sewerage purposes, the Court said:

"Another point made is that no notice of the purpose to build this sewer was given to the appellant before the work was begun and finished. * * * It may be conceded that before an assessment for the expenses of the work is laid, those who are to be affected thereby shall have notice and opportunity to be heard. It is not alleged in this case, that it was otherwise than that. The complaint is that no notice was given of the purpose to build this sewer. We do not think that notice was a legal prerequisite."

In matter of De Peyster, 68 N. Y., 88, 97, the decision In Re Zborowski was recognized and followed upon the point that "a determination of a municipality to enter upon a work of local improvement is not invalid for lack of prior notice to owners of property to be affected, of an intention so to do."

Holt vs. *The City*, 127 Mass., 408.

Certiorari to quash the proceedings of a City

Council in laying out and constructing a public park.

"It is contended," said the Court, "that the parties assessed were entitled to notice of the intention to levy the assessment, and opportunity to be heard, and that those whose lands were taken, were entitled to notice of the taking. But the Statute does not require notice either of the taking or of the intention to levy the assessment, and the rights of those whose lands are taken, or whose property is assessed is amply secured by the opportunity to appeal to a jury if they are dissatisfied. *Upon the question of the necessity of taking private property for public use, parties interested have no constitutional right to be heard.* The authority to determine that question is in the State, or in tribunals to whom the State has delegated the power. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the Legislature may, in its discretion prescribe. * * * In the exercise of the right of eminent domain, the power to take private property for a public park is not open to question. There are considerations affecting the health and comfort of a dense population, which *the Legislature* in such cases may well regard as sufficient to create the public necessity. *Its judgment as to the existence of the exigency, when fairly exercised, is not to be revised by the Courts.*"

Brewster vs. *Syracuse*, 19 N. Y., 116.

Action to enjoin the collection of a special assessment for constructing a sewer, to which a demurrer was interposed and overruled, the defendant appealing.

Said the Court: "It would * have been within the clear authority of the Legislature, to have authorized the City government of Syracuse, *without the consent of any person specially interested*, to construct the sewer, and to assess by way of tax, the expenses on such persons as ought, in the judgment of the Legislature to bear that burden, and it does not at all follow from the fact that the Charter of Syracuse required as a preliminary

to the action of the Common Council that the consent of a majority of the property-owners to be benefited should first be obtained, that the contract entered into by the City with the constructors of the sewer, is to be deemed a contract between the property-owners and the constructors. The property-owners were not in any sense parties to the contract. Their consent to the building of the sewer, though a necessary condition to the exercise of the power actually conferred by the Legislature on the City Government, was *not at all necessary to the complete authority of the Legislature over the whole subject.* The taxation of the individuals interested in regard to this sewer stands on the same footing as all other taxation by authority of the Legislature."

In *People* vs. *Smith*, 21 N. Y., 595, which was a petition for certiorari to review proceedings in laying out a highway, the Court said:

"The question is, whether the State in the exercise of the power to appropriate the property of individuals to a public use, where the duty of judging of the expediency of making the appropriation in a class of cases is committed to public officers, is obliged to afford to the owners of the property an opportunity to be heard before those officers, when they sit for the purpose of making the determination. I do not speak now of the process for arriving at the amount of compensation to be paid to the owners, but of the determination whether under the circumstances of a particular case, the property required for the purpose shall be taken or not, and I am of opinion that the State is not under any obligation to make provision for a judicial contest upon that question. * * The necessity for appropriating private property for the use of the public or of the Government is not a judicial question. The power resides in the Legislature. It may be exercised by means of a statute, which shall at once designate the property to be appropriated, and the purpose of the appropriation, or it may be delegated to public officers, or as it has been repeatedly held, to private corporations established to carry on enterprises in which the public are interested. * There is no restraint upon the power, except that requiring compensation to be made. * * It (the Legislature) may allow the owner to intervene and participate in the discussion be-

fore the officer or board to whom the power of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of propriety and duty without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the legislature shall, in its discretion, prescribe."

Ice Works vs. *City of Lockport*, 28 Hun., 9, an action to recover back money paid under an assessment for the construction of a sewer, which was claimed to be invalid, because the ordinance authorizing the work was passed without notice to the plaintiff and without affording her an opportunity to be heard, it was said:

"As to the want of notcie, it is true that no notice was given of the action of the Common Council in defining the real estate which they deemed benefited by the proposed improvement; nor do we understand that such notice is requisite under the charter. * The only notice required by the charter is of the assessment, and that was given in the mode prescribed. * * Where notice of the assessment is provided for, we are not aware that an omission in the statute to provide for notice of the preliminary proceeding defining the area to be benefited by the proposed improvement, has been held to render the statute unconstitutional."

The plaintiffs rely for support upon a couple of cases in New Jersey. These cases stand alone. They proceed upon the assumption that proceedings for opening or widening streets are strictly judicial in their charter. This contention is disposed of by the remarks of the Court in matter of *Zborowski* 68 N. Y., 97, where it is said:

"The appellant cites authorities from which we will not dissent, that no judicial proceedings can be taken by which the property of any one will be affected, without notice first given him. He also cites authorities from which we will not dissent, that municipal bodies, in devising the plan of street and other improvements, act judicially and not ministerially. We conceive that the phrase "judicial" is not used in the same sense in the two classes of cases. In the first class, the term is used of such bodies or officers as have the power of adjudication upon the rights of persons and property. In the second class, it is used to express an act of the mind or judgment upon a proposed course of official action as to an object of corporate power, for the consequences of which the official will not be liable, though his act may not be well judged, as differing from a ministerial or physical act of an official, for which, if negligently done, he or his superior will be held to answer. We do not think that the determination of a municipality to enter upon a work of local improvement is invalid for the lack of prior notice of intention so to do, to the owners of property to be affected."

Secondly.—If the parties were entitled to be heard before the Board of Supervisors upon the question of the expediency of ordering the improvement, then, they had both notice and opportunity of such hearing. The ordinance declaring the intention of the Board to proceed with the improvement was published for five days after it had passed to print and before it was finally adopted. The sole object of this publication was to give notice of the contemplated action of the Board and to afford all parties an opportunity to appear at the next meeting and be heard upon the subject of the final passage of the ordinance.

2. It is next contended by the learned counsel

for the plaintiffs in their brief in reply, pp. 18 and 25, that " the property owners affected by this assessment, were entitled to be heard before the Commissioners, or before the County Court, upon the question as to whether or not the Commissioners were invested with jurisdiction and authority to make the assessment, by the passage of a proper resolution or ordinance by the Supervisors and by the other preliminary steps required to be taken before the assessment was made;" they " had a right to be heard as to the validity of the statute authorizing the assessment, the authority of the Board to make it, their fraud, misconduct and errors in making it, the equality and fairness of it, and the justice and propriety of the changes made in it after it was reported, so far as it affected his liability. * * * To do complete justice, therefore, and to constitute due process of law, the right of each property-owner to be heard should have been continued until the final confirmation of the report."

The learned counsel contend that the Dupont Street Act denies this hearing and is, therefore, "an unconstitutional and void act."

To this I answer:

I fully admit the right of the parties in interest to the complete hearing which the learned counsel claim for them. I fully admit their right to such hearing before judgment is pronounced against

them condemning their property for a public use, or burdening it with the cost. I fully admit that, before the County Court, the parties were entitled to be heard if they so desired, to urge in opposition to a confirmation of the report, that the Statute was invalid; that the Board of Supervisors had not passed the requisite ordinance or resolution which was to inaugurate the proceedings; that the Commissioners had not acquired jurisdiction of the matter; that the assessment was tainted with fraud; in fine, anything which would impeach the validity, legality or justness of the assessment, and would be a reason for denying its approval or confirmation.

But, I do not assent to the contention that this full and complete hearing is denied by the Statute. On the contrary, there is not a word in the Statute evincing any intention on the part of the Legislature to restrict or take away the right to this complete hearing. If the right to this hearing is, as plaintiffs contend, a constitutional right, the mere silence of the Statute does not take it away or abridge it. The Constitution and the Statute must be read together; and the rights guaranteed by the higher, held to be blended with and inseperable from those conferred by the inferior law.

This proposition has been already sufficiently elaborated, and it is unnecessary to dwell upon it further.

The uniform practice in the Courts of San Francisco, in cases like the present, has been to hear the parties in interest upon all the points enumerated by counsel here ; and the cases are numerous, in which proceedings similar to these have been quashed by the County Court on the ground that the Statute was unconstitutional, or the procedings void for want of jurisdiction, or irregular and violative of the provisions of the law, and the like.

Indeed, in this very case, it was considered by everybody that all possible objections tending in any manner to show the illegality or injustice of Commissioners' proceedings could be urged in the County Court against the confirmation of their report. By referring to the transcript we find that, on the 20th of October, 1876, James Phelan, by his attorneys, Jarboe & Harrison, filed his objection to said report on the grounds that : 1st. "The Board of Supervisors had never, by resolution or order, expressed, in any form, that it was their judgment that it would be expedient that Dupont Street be widened," &c. 2nd. "The said Board of Dupont Street Commissioners have never published the notices provided by Section One of said Act," &c. 3rd. "Nine per cent. and upwards of the entire cost of the proposed improvements, for conjectural expenses that may never arise, and which are not shown to have any foundation in

fact, or to be based upon any fact or principle, is greatly in excess of what ought to be allowed," &c. 4th. "The assessment or appraisment of benefits against * * * petitioner as shown by the said report is unjust, relatively unequal to the amount assessed to other lots," &c. 5th. "The Act of the Legislature under which the proceedings of said Commisioners have been taken is unconstitutional and void," &c. [Trans., pp. 266, 277.]

On the same day, a similiar petition was filed on behalf of Thos. Blythe, by H. H. Haight, his attorney. [Trans., pp. 277–286,] and by various other parties. [Trans., 286–305.]

Some of these objections were deemed by the Court well founded. Others were thought ill founded and, therefore, overruled. [Trans., pp. 308–316.]

It appears, therefore, that, in practice, both bench and bar concurred in giving to this Act such a construction as would afford objecting parties the ample and full hearing claimed by counsel here to be guaranteed as a constitutional right.

It is now claimed that the statute restricts the hearing to objections appearing upon the face of the report. This claim is based upon the language of the statute—"any person feeling himself aggrieved by the action or determination of the said Board, *as shown in the report*," may apply by pe-

tition, &c. It is said that the words "as shown in such report" indicate that no action or determination of the Board which is not shown in the report can be made the ground of objection. But, this is a very clear misapprehension. The language just used is descriptive of the persons who may object, but not of the character of the objections which may be made. That is found further down, where it is said the petitioner shall "set forth his interest in the proceedings had before said Board, and his objections thereto." This latter language describes the character of the petition and its contents. Under it, all that a petitioner has to show or state is that his property is affected by the proceedings had before the Board of Commissioners, and the reason and grounds of objection thereto. The statute does not undertake to define what objections shall be made; nor does it in any manner restrict the nature or character of the objections that may be urged.

Clearly, I repeat, the words "any person feeling himself aggrieved by the action or determination of the said Board as shown in said report" are merely descriptive of the persons who may object, and are intended to confine the class of objectors to those, who, upon the face of the report, appear to be affected by the proceedings, and to exclude outsiders, who might consider themselves incidentally and indirectly affected by the report.

But, these words do not restrict the right of such persons to make any objections they may deem proper against "the proceedings had before such Board." Of course, none of the parties directly affected by the proceedings of the Board have any interest to object, unless they feel aggrieved by determination of the Board *appearing and shown in their report.* If the report, so far as it concerns them, is satisfactory, what motive can they have to object? If the award of damages, or the assessment of benefits made to them, as shown in the report, is entirely satisfactory to them, how can they feel themselves aggrieved? No defect or irregularity that does not culminate in something which appears upon the face of the report, can possibly grieve them. Therefore, only those who deem themselves aggrieved by the determination of the Board as to damages and benefits, as shown in their report, can possibly object to the report. But, when they deem themselves thus aggrieved, they may make any objection they please to the proceedings of the Board. Whether they feel aggrieved or not, is not a disputable fact. Therefore, the descriptive words used really permit all persons in the district to file objections, if they please.

Paraphrase the language of the statute and it clearly comes to this: "Any person who appears upon the face of the report of the Board to be

affected by the proceedings, and who is dissatisfied with and unwilling to accept or acquiesce in the award of damages or the assessment of benefits made to him upon the face of the report, may oppose the confirmation of the report, and set forth and urge in the County Court his objections to the proceedings of said Board."

3. It is next urged that the hearing of the parties in interest was confined to the unsubstantial point of bringing the report into Court, and did not extend to the substance of the report itself.

To this I answer:

A hearing is granted to a person whose property is sought to be affected or charged, whenever, before the valuation or charge becomes finally fixed and determined, he is given a right to appear before an appropriate officer, Board or Court, and contest it.

"It cannot be material," says this Court,[1] "that the land owner had no notice before the proportional benefit to his land was estimated by the commissioners, if, in the subsequent action, he has had his day in Court, with full opportunity to contest this charge before it was declared a lien upon his land or a judgment to be collected out of his general property,"

"In some States," says the Supreme Court of the United States, "the assessment may be revised by proceedings in the Court, and be there corrected if erroneous, or set aside if invalid, * * * In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment, which can be deemed essential to render the proceedings due process of law."[2]

[1] Rev. Dist *vs.* Evans, 61 Cal., 107.

[2] Hagar *vs.* Reclamation District, 111 U. S., 710.

In the present case, the Board of Commissioners acted as assessors and appraisers. They made their assessment and valuation in the form of a report, in which the property to be taken and charged was described, and the name of the owner, when known, was set down. This assessment had no legal validity, and was binding upon no one, until it was approved and confirmed by the judgment of the County Court. That Court was the tribunal which finally determined the extent of the valuation or charge upon the property. If the land-holder is granted a hearing before that tribunal, the constitutional provision, which requires a hearing to be accorded, is satisfied.

The statute here provides that the owner may "apply by petition to the County Court, setting forth his interest in the proceedings had before said Board, and his objections thereto." The Court is "authorized and empowered to hear said petition," and to set a day for the hearing. The Board is notified, and may answer the petition and appear by counsel. When the day set arrives, "testimony may be taken by said Court upon said hearing, and the process of the Court may be used to compel the attendance of witnesses and the production of books, or papers, or maps in the custody of said Board, or otherwise."

Pausing here, and reserving for future consideration the question of the relief to be granted, I ask: Is not this a hearing—all the hearing necessary? To illustrate: A's land is assessed $1000, and he feels aggrieved, deeming that it ought to be assessed $500 only; he files his petition, setting forth that his objection to the report is that it assesses his land at $1000, when, in truth, it ought to be only $500; the Board appear and deny his averments; the issues thus joined come on to be tried before the Court; by means of the process of the Court, the contestant produces all the witnesses he desires to summon, and all the books, papers or maps in the custody of the Board or otherwise; the Court hears all his evidence and listens to all his arguments adduced in favor of reducing his assessment.

What more or greater hearing than this can be given?

Of course, a hearing would be a mockery, if it could not be followed by relief; and the question here arises: Can the Court, after this hearing, afford relief commensurate with the issues tried? It is contended by the plaintiff here that it can not. It is asserted that the statute means that, after all this elaborate preparation—petition, answer, testimony, trial—the Court is bound to leave the complainant just where it found him. The complainant, we will suppose,

sets forth his grievance, he proves it to the satisfaction of the Court; the Court, after solemn trial, concludes that his cause is just. Does the statute mean that the conclusion thus reached is to remain locked up in the breast of the Court? That it shall not avail the party before it? So to construe the statute would be unreasonable, if it can be avoided. It is the duty of Courts to give laws a reasonable construction. It is reasonable to suppose that when a trial by a Court of an issue is provided for, it is meant to be followed by a judicial decision commensurate with the nature of the contest. The contrary would be abhorrent to common sense, and would make a theatrical farce of judicial proceedings.

Does the statute, then, upon a fair construction, authorize the Court to grant a petitioner the relief which the statute permits him to pray for and to establish his claim to? Undoubtedly, the phraseology of the statute is somewhat obscure; still its meaning is sufficiently plain.

The upshot of the petition and hearing can not be as contended by the plaintiff here, (Brief, p. 25) simply to have the report brought into the County Court; for, the report must be presented there, in any event, petition or no petition. Nor can it be simply to bring into Court the "documents or data as may be pertinent thereto"; for, these may be brought into Court at the hearing, by process

of the Court for the "production of books, or papers, or maps in the custody of said Board." Indeed, under this head, no reason is perceived why the Court may not, upon the hearing of the petition, order by its process the production into Court of the report itself as a "book or paper in the custody of said Board." Why should it not? Cases may readily be imagined when the report would be absolutely necessary to a proper hearing of the petition.

It is obvious that the end of the proceedings is found in the following words of the statute:

"The Court shall have power to approve and confirm said report, or refer the same back to said Board, with directions to alter or modify the same in the particulars specified by the Court in the order referring the same back; and thereupon said Board shall proceed to make the alterations and modifications specified in the order of said Court."

It is clear, I submit, that if these powers of the Court with reference to alteration and modification are not to be exercised in the case that I have stated, of a petition by an aggrieved party, they can not be exercised at all, and this portion of the statute is meaningless. For, the Court has no power to modify or alter the report, if no objection to it is made. When no objection is made, the Board, of course, are satisfied with the report, for it is their production; and, in the absence of objections, they themselves present it "with a petition to the Court, that the same be approved and

confirmed by the Court." The property owners are in law deemed satisfied with it, since, having been notified to examine it in the office of the Board, they have found no fault with it, or have been content to accept it without examination. In the absence, therefore, of any objection, the judgment pronounced by the Court confirming the report, is a judgment by consent—a judgment by default against parties who, having been cited to set forth their objections, remain silent. To modify or alter a report with which every person in interest is satisfied, is not within the attributes of the Court; and is evidently not in the contemplation of the statute.

When there is a petition, the petitioner complains of the report, and sets forth that an assessment therein contained should be lowered, or an award of damages should be raised; having in view the power of the Court to modify and alter the report, the petitioner prays that the report be brought into Court for the purpose of being altered or modified in the particulars specified; issue being joined by the Board upon the petition, a hearing is had upon the issue, whether the assessment be, indeed to high, or the award too low; witnesses are sworn; all the "books, papers, and maps in the custody of said Board" are brought before the Court; thereupon, the Court, if satisfied of the justice of petitioner's claim, orders the Board to bring the report before

it, and then refers it back to the Board to make the proper alteration and modification.

This, I submit, is the reasonable meaning of the statute. It gives effect to every part, and does violence to none. It conforms to the ordinary and logical mode of procedure, and avoids the absurdity of a solemn trial terminating without a judgment.

And this was the construction placed upon the statute by the County Court and the parties who appeared before it. By reference to the Transcript we find that, on the 20th day of October, 1876, Thomas H. Blythe filed his objections to the confirmation of the report [Trans., pp. 277–286]. *On the same day* the Court made an order setting the petition down for hearing on the 27th day of October, 1876, and the order proceeds "that said Board be, and it is hereby required, to file with this Court, on or before the time set for the hearing of said petition as aforesaid, the report of said Board, with the maps, plans, diagrams and data used by said Board in preparing said report" [pp. 293–294]. The same order was made in the case of the other objecting parties, and, in obedience to said order, the Board did file with the Court its report and the documents and data pertinent thereto [p. 305].

Then, on the 18th of December, 1876, upon the hearing of said petition and objections, it was

"ordered that said report be, and the same is hereby referred back to said Board of Dupont Street Commissioners, and that said Board be and is hereby directed to alter and modify the same in the manner following, to wit:" [p. 312.]

4. It is next claimed that the action of the County Court granting relief was discretionary—a matter of grace and not of right.

The objection that "it was discretionary with the Court to grant or refuse the order—if it was refused, there was no further chance to be heard," is tenable only when it is admitted that a hearing must be perpetual. The Court is bound to hear the petitioner's objections The Court, says the statute, "shall set the same down for a hearing." The hearing is full and complete; witnesses, books, papers, maps in the custody of the board or otherwise, may be pro luced. After this ample hearing, when the Judge is fully informed, the Court may or may not grant the relief sought. It may be said to be in its discretion to do so, when it is understood that discretion means "to discerne by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion."[1] "The discretion intended is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by

[1] Co. Litt. 227 B.

fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede, the ends of substantial justice."[2]

The right to be heard was absolute. The obtaining the relief sought depended, of course, upon the legal discretion of the Court.

II.

THE PROCEEDINGS PROVIDED BY THE STATUTE FOR THE WIDENING OF DUPONT STREET HAVE BEEN STRICTLY FOLLOWED BY THE BOARD OF SUPERVISORS, THE BOARD OF COMMISSIONERS, AND THE COUNTY COURT.

1 *The resolution or order of the Board of Supervisors under Section 21.*

(a.) On the 27th of March, 1876, the Board of Supervisors adopted a resolution which, in form, complies with the requirements of the statute. [Trans., fols. 556–558.]

The objection to the resolution is that "it was passed only once in the Board; it was never presented to the President of the Board for his approval, or signed by him, and was never published, either with or without the vote thereon."

The conclusive answer to this objection is found in the brief of Messrs. McAllister & Bergin, Sec.

[2] Bailey *vs.* Taaffe, 29 Cal., 424.

IV; and I could add nothing to what is there stated.

(b.) On the 17th of April, 1876, the Board of Supervisors adopted, and passed to print, another similar resolution in proper form. It was finally passed May 1st, and received the signature of the Mayor, May 3d, of the same year. [Trans., fols. 764, 433–435.]

The resolution was duly published in the official paper of the Board of Supervisors, on the 18th, 19th, 21st and 22d of April, and on the 20th it was published in the supplement to the paper. [Fol. 434.]

The only objection to this resolution is the fact that it was published in a "supplement not circulated co-extensively with the paper." To this there are several conclusive answers:

First. The resolution having been adopted by the Board and signed by the Mayor as having been regularly and duly printed, the question of its having been sufficiently printed is no longer open. Surely, a person who relies upon a resolution or ordinance of the Board of Supervisors, which appears, by its records, to have been regularly passed, approved and signed, is not bound to prove, it may be twenty years after its passage, that it was printed the requisite number of times. Nor are his rights subject to be forfeited, because it may be shown by parol after that period of time, that

one particular insertion was defective. If this were the law of municipal ordinances, to rest upon them would be worse than building upon quicksand. The Board cannot legally pass, nor the Mayor sign, an ordinance, unless it has been duly printed. Its final passage by the Board and signature by the Mayor is a conclusive adjudication that it has been so printed.

This is settled law.

City of St. Louis vs. *Foster*, 52 Mo., 514.

The defendant there was prosecuted for the violation of a city ordinance prohibiting the keeping of gaming tables. On the trial he objected to the introduction of the ordinances, claiming they were invalid, because, among other reasons, they were not read and published before adoption, as required by law. His objections were overruled and the ordinances admitted, which is claimed as error.

Said the Court: "The Charter * provides, that every ordinance shall be read on three different days of the stated session, at which, and before it was passed, and the objection was interposed to the reading of the ordinance, that this direction was not pursued. But notwithstanding this, the Court admitted it. The laws on this subject was elaborately considered in the case of the *Pacific R. R.* vs. *The Governor*, (23 Mo., 353) and it will be unnecessary to restate what was so well said by the learned Judge, who wrote the opinion in that case. It was clearly decided, that the validity of a statute, authenticated in the manner pointed out by law, could not be impeached by showing a departure from the forms prescribed by the Constitution, in the passage of the law. The same principle applies to municipal corporations. Their Charters are their

Constitution, which authorize the Councils to act, and a City Council is a miniature General Assembly, and their authorized ordinances have the force of laws passed by the Legislature of the State. * * * As the ordinance had all the marks of being valid, and appeared to be regularly passed and was published by authority, we are satisfied that it could not be rejected as evidence on the alleged ground that it was incorrectly passed as to matters of form."

Secondly. The assertion that the "supplement was not circulated co-extensively with the newspaper" does not appear to be borne out by the evidence. The only testimony on that point is, that these supplements "were circulated with the paper, distributed in the same way and at the same time as the paper itself, and go to every subscriber who takes the paper." [Trans., fols. 1035, 1039.]

Thirdly. The publication in the supplement was perfectly legal.

"A publication in *Extras*," says Burroughs, on Taxation, p. 291, "circulated with the paper designated by law is a good publication."

Is there not something revolting to common honesty, in the idea that the City of San Francisco can avoid the payment of $1,000,000 of bonds, issued in payment of property which it now holds and enjoys as a public street, because, forsooth, an ordinance was, for one day, printed in a supplement?

2. *The notice required by Section 6, to be published by the Commissioners.*

The Board of Dupont Street Commissioners "claiming to act under the Act of the Legislature," met on the 3d day of April, 1876. [Finding III, Trans., fols. 424–426.] On the 10th day of April, they again met, and adopted a resolution that the notice "provided for by Section VI of the Act of the Legislature" be published, designating the papers in which it should be published. [Finding III, fols. 426, 527–530.] The Secretary caused the notice to be published as directed. [Finding VIII, fols. 436–439, 534.]

The objection to this publication is, that it was published, at times, in the supplement of the papers, and that the Secretary was not authorized to cause it to be published, and that the Secretary selected the newspapers to publish it in, and the Board had no authority to act until the Supervisors had adopted a resolution.

(a.) As to publication in supplements, I have already noticed that, above.

(b.) As to the Secretary having no authority, that is an error. The Board expressly authorized him. [Fols. 531, 532.]

(c.) As to the papers being designated by the Secretary, that is equally an error. The Board designated the papers. [Fol. 527.]

(d.) The Board did not derive their authority

from the Board of Supervisors, but from the Act. [Sec. 4.] They might not, it is true, give the notice under Section 6, until after the Supervisors had adopted a resolution; but, surely, they might in anticipation of that resolution, resolve that, as soon as it was adopted, the proper notice, under Section 6, should be given. And that is what they did do. [Fol. 531.]

There is no question that the notice was published after the resolution of the Board of Supervisors was adopted, the first publication being on May 4th, 1876. [Fol. 437.] These notices appear regularly in the minute book of the Board of Commissioners. [Tran. fols. 1073, 1076.]

After all this, (even if the facts warranted the objection, which, as I have shown, they do not), it is too late, I submit, to urge that the Board of Commissioners did not authorize the action of their Secretary in making the publication, or the selection of the papers in which the publication was made.

3. *The Board of Commissioners did, after having completed their report, duly give and cause to be published the notice that the same was in their office, open for inspection, as required by Section 7 of the Act.*

The only objection made to this notice is, that it was published, at times, in supplements, and

was insufficient, because "the time of publication was taken out of the thirty days that the report was to be on file."

(*a.*) As to supplements, that has been sufficiently noticed.

(*b.*) As to the other objection. The report is, after completion, to be left in the office of the Commissioners "for thirty days" [Sec. 7.] Objections to the report must be made "at any time within the thirty days mentioned in Section 7." [Sec. 8.] In case no objection is made "within the time above limited," the Board must present the report to the Court. [Sec. 8.] Obviously, therefore, the twenty days publication must be taken out of the thirty days. It is intimated that this renders the notice invalid in point of law; but no reason is suggested to support this view, and none can be imagined.

4. *The judgment of the County Court, confirming the report, was regularly entered.*

The judgment is perfectly regular upon its face; and, indeed, is avowed to be so in the complaint here. [Trans. fols. 50, 51.] It need not, therefore, be further noticed.

I submit, therefore, that all the proceedings of the Supervisors, Commissioners and County Court, required to be taken and had under this Act, have been regularly had and taken.

As to secret vices in the proceedings, such as erroneous systems of valuation, interest of the Commissioners, "indecent haste" in procuring confirmation, and the like, they will be noticed when I come to examine the effect of the judgment of the County Court.

III.

THE JUDGMENT OF THE COUNTY COURT IS A CONCLUSIVE ADJUDICATION IN ALL COLLATERAL ACTIONS, THAT (1) THE STEPS REQUIRED TO BE TAKEN BY THE SUPERVISORS AND COMMISSIONERS, TO GIVE VALIDITY TO THEIR PROCEEDINGS, HAVE BEEN DULY TAKEN ACCORDING TO LAW, AND (2) THAT THE ACT, ITSELF, IS CONSTITUTIONAL.

Before proceeding to discuss these propositions, let me advert to a claim which is constantly urged by the learned counsel for plaintiffs, as to the character in which the County Court acted in these proceedings. They maintain that the County Court was, in this matter, a Court of special and limited jurisdiction; that, it possessed no other powers than such as were expressly conferred upon it by the Statute; and that, therefore, its judgment is of no higher value than would be that of a mere Board created by the Statute and authorized to act upon the subject.

I admit that the rule is that, where a Court, however general its ordinary jurisdiction, is *by statute*

alone invested with a jurisdiction which it did not have as a Court before the passage of the Statute, it may be said that, acting wholly under the Statute, it is *quoad hoc* a Court of inferior or limited jurisdiction. As said the Court of Appeals of New York in *Embury* vs. *Connor*, 3 N. Y., 523, "as its powers in such matters *are wholly derived from the statutes* and do not belong to it, as a Court of general jurisdiction, its decisions must be treated like those of a Court of special and limited jurisdiction."

It will be noticed, in all the cases upon the subject, that it is of the very essence and, indeed, is the very foundation of the rule that the powers of the Court to take jurisdiction of subject matter *shall be derived wholly from the statute.*

That rule does not apply here. The County Court does not derive its authority to act in matters of this character from the statute, but from the constitution of the State [Const. Sec. 9, Art. VI]. "The Constitution itself has distinctly provided that the jurisdiction in special cases shall be in the County Court," and "proceedings for the opening, grading, extension, paving and alteration of streets, and the assessment of damages thereby, have been treated by the Legislature and the Courts as special proceedings." [Houghton's Appeal, 42 Cal., 62, 56.] The Constitution makes that Court a Court of record. [Const., Sec. 8,

Art. VI.] "The proceedings of this Court are construed in the same manner and with like intendments, as the proceedings of Courts *of general jurisdiction* and to its records, orders and decrees, there is accorded the like force, effect and legal presumptions." [C. C. P. 587.]

When the Constitution started out by declaring that the County Court was a Court of record, and then, in the very next section, gave it jurisdiction over special proceedings, did the Constitution mean that, when the Court exercised, in a special proceeding, the very jurisdiction expressly conferred upon it by the Constitution, it should not exercise it as a Court of record? Did the Constitution mean that the County Court should be a Court of record in all matters *except* special proceedings? What warrant is found in the language of the Constitution for ascribing any such contradictory meaning to that instrument? Further: When the Code says that the proceedings of the County Court are to be construed in the same manner, and with like intendments, force, effect and legal presumptions as the proceedings of Courts of general jurisdiction, what proceedings of the County Court is the Code speaking of? Is it not speaking of all proceedings which the Court has jurisdiction of under the Constitution of the State? Does the Code say that that construction shall be given to some of the proceedings of the County

Court, but denied to others? No. The language is general and without exception or restriction. What ground is there, then, for saying that the proceedings of the County Court shall be treated as the judgment of a Court of general jurisdiction, except when it is exercising in "special cases" a jurisdiction directly conferred upon it by the Constitution?

It is too clear for argument, I submit, that the County Court is created by the Constitution a Court of record, for the purpose of discharging all the functions imposed upon it by the Constitution—including "special cases" as well as others. It is no less clear that the proceedings of this Court taken in "special cases" are, under Sec. 87 of the Code, to be treated "as the proceedings of Courts of general jurisdiction."

The contention, therefore, of the learned counsel opposite, that the order of the County Court, in this case, approving and confirming the report of the Dupont Street Commissioners is to be treated as the order of a Court of inferior jurisdiction, and to be deprived of the aid of the beneficent "intendments, effects and legal presumptions" which wait upon the judgments of "Courts of general jurisdiction," is based upon a misconception of the source of the jurisdiction of the Court, and is absolutely untenable under our constitution and laws.

I. THE JUDGMENT OF THE COUNTY COURT IS A CONCLUSIVE ADJUDICATION IN ALL COLLATERAL ACTIONS THAT THE STEPS REQUIRED TO BE TAKEN BY THE SUPERVISORS AND COMMISSIONERS TO GIVE VALIDITY TO THEIR PROCEEDINGS HAVE BEEN DULY TAKEN ACCORDING TO LAW.

(*a.*) The judgment of the County Court giving its approval and confirmation to the report, was a judgment by which, if valid, an assessment was legally established, by which a charge upon property-owners was legally created, by which the property of citizens was taken for a public use. That Court, we all admit, had no authority to make this assessment, to impose this charge, to take this property, unless it had jurisdiction of the persons to be affected by its judgment – the owners of the land. Jurisdiction of these persons depended upon the fact of their having been summoned into Court by some process known to the law and appropriate to the case. The process, in the present case, was the published notice under Section 7. The jurisdiction of the Court over the persons affected depended upon the fact that this notice had been given as required by the statute.

Now, when the Board finally presented their report, and asked for the judgment of the Court confirming it, the Court had the right to pronounce judgment against the parties to be affected by its judgment, if it had acquired jurisdiction over them

—if the process provided by law had been served upon them. If the Court had not acquired jurisdiction over them—if the process had not been served upon them—it had no right to pronounce judgment against them. Surely, it will not be contended that, upon this vital point, the Court is ordered by the statute to act blindly. The petition of the Board, together with its report, is but a prayer addressed to the Court to pronounce judgment against the land-holders by default. It is a representation that the parties in interest, having been duly summoned to appear, by their silence consent to the proceeding taken and to be taken against them. The Court must, then, in some way, know that they are in default; that, having had notice and opportunity to contest the proceedings directed against them, they are satisfied, and do not choose to contest them.

It seems to me perfectly clear that the very first inquiry of the Court, when called upon to pronounce this judgment, must, of necessity, be, whether the notice required by Section 7, has been given, or not. In other words, the Court must, at the threshold, inquire into its jurisdiction over the persons—its right to act at all.

In this case, the Court made the inquiry, and determined and adjudged that the fact existed—that the process had been duly served upon all persons in interest. Its judgment (fols. 976, 977,) so

states, and there is nothing in the record to contradict it. Can that determination be attacked collaterally by evidence outside the record? I understand it to be the settled doctrine in this State, that the judgment of a Court of record imports absolute verity upon all things on which it is authorized to speak; and that, if the judgment adjudges the fact that all parties against whom the judgment is pronounced, have been duly served with process, and have made default, that adjudication, there being nothing in the record to contradict it, is final in all collateral actions.[1]

Were it even true, therefore, that the notice provided by Section seven was not properly published, because published, at times, in a supplement, (and this is the only fault found with the publication), that fact could not avail the plaintiffs, for the Court has found that it was "duly published in two daily newspapers," (Trans., fol. 977), and that finding cannot be impeached by showing by evidence *aliunde* that it was, at times, published in a supplement.[2]

(*b.*) But the investigation of the County Court was not to stop with an inquiry into the mere service of process upon the parties in interest. By its action it was to establish, in the form of a solemn judgment, things of the highest importance

1. Hahn *vs.* Kelly, 34 Cal., 391.
2. Id. ibid.

and of far reaching consequences. Upon its judgment, as a judicial determination, it would result that property estimated to be worth nearly one million of dollars was to be taken from private citizens and transferred to the City of San Francisco, to be dedicated to a public use; that rows of buildings upon the whole side of a main street in the City were to be torn down; that bonds in the sum of one million of dollars would be sold and floated upon the world by the City authorities; that a charge of twenty years would be laid upon the property of a whole district.

These were the consequences of the judgment of the County Court, foreseen and provided for by the Legislature. This judgment we are told, was a valid judgment, if the Board of Supervisors had, after due publication, adopted the ordinance provided for in Section 21 of the Act; but, if the board had not so adopted the ordinance, then the judgment was a nullity. We are further told that, even though it might appear regularly upon the records of the Board of Supervisors to have been adopted by the board, and to have received the approval of the Mayor, yet the ordinance would be void, if it could be shown that, on one of the five days of its publication, it was printed in the supplement of the newspaper, or that the supplement was not circulated co-extensively with

the newspaper. We are told, further, that, whenever this is shown, it establishes, as a matter of law, that the judgment of the County Court was a nullity, and all proceedings under it are void.

Follow out the consequences of this doctrine: The Board of Supervisors have adopted the resolution under Section 21, but, on one day, it was published in the supplement of the Examiner, instead of the Examiner itself; and, therefore, according to plaintiff's contention, it is a nullity. The Board of Commissioners meet and make surveys, diagrams, reports; they employ a secretary, attorneys, clerks, draughtsmen, searchers of records and other assistants; they make a report to the County Court; the Court by solemn judgment, confirms it; bonds to the extent of one million are sold by the City, and are readily bought by all classes of people; the Commissioners, thereupon, tear down the buildings upon the whole length of the west side of the street; when they reach the last building, the owner thereof discovers that the publication of the ordinance was made, for one day, in the supplement of the Examiner; thereupon, he procures, upon the ground that the whole proceeding is a nullity, an injunction upon the board to refrain from laying hands on his property; this injunction is served, a trial had, and the Court, upon the ground that the ordinance, which was the basis of all the proceedings, had never

been legally published, declares the proceedings a nullity, and makes the injunction perpetual.

The picture I have sketched is neither fanciful nor overdrawn. It is naturally suggested by the theory of the plaintiffs here. Can it be that the Legislature, in framing this Act, contemplated that such a condition of affairs should ever be possible? Can it be that they contemplated that these proceedings should go on to the point of issuing bonds and tearing down buildings, without having made sure and placed beyond the reach of controversy the fact that the proceedings were in accordance with law? If the ordinance is, indeed, the foundation of all the rest, can it be that the Legislature intended that the legal sufficiency of that foundation should not be conclusively established, before the superstructure was finally erected? Would such a construction as this be a reasonable construction of the Act? If such a construction can be avoided, will not the Court readily embrace the opportunity?

I contend, that if the power of the County Court to pronounce a valid judgment, or to make a valid confirmation of a report, depended upon the fact that a certain ordinance had been passed, then the Court had, at the outset, jurisdiction to inquire and determine whether such ordinance existed; and, if the validity of the ordinance depended upon its publication, to inquire into the pub-

lication And, I contend, further, that when, after such inquiry, the Court determined judicially that the ordinance did exist and was valid, as it did here, (fol. 966) it set that question forever at rest in that proceeding.

The ordinance was a fact, without the existence of which the Court could never be brought in legal relation with the proceedings. The Court, acting as the minister of the law, in pronouncing judgment, necessarily determined that it had the right so to pronounce it. If the legal right to pronounce the judgment, depended upon the existence of any extrinsic fact—an ordinance, or the like—the very rendition of the judgment is a conclusive adjudication that the fact existed. As this Court said of similar proceedings, in *People* vs. *Hagar*, 52 Cal., 183, "these were jurisdictional facts, which the Board necessarily determined in approving the petition, and its action is not open to attack in a collateral action. Whenever the jurisdiction of a Court not of record (and, *a fortiori*, of a Court of record) depends on a fact which the Court is required to ascertain and settle by its decision, such decision, if the Court has jurisdiction of the parties, is conclusive, and not subject to any collateral attack. Freeman on Judgments, Sec. 523. Bigelow on Estoppel, p. 142."

It is said that the statute does not expressly authorize the County Court to institute this in-

quiry and that, therefore, it had no right to institute it or pass upon the question. There was no necessity for any express grant of authority on this subject by the statute. In conferring upon the Court the power to pronounce judgment, the Legislature necessarily contemplated that this judgment should be valid and legal. If, to render the judgment valid, it was essential that certain facts should exist, then the Legislature necessarily contemplated that the Court should examine and decide upon their existence.

To illustrate what I have said: Assume that the Board and a dissatisfied property-owner appear before the Court, to litigate the question of the confirmation of the report—suppose that the contestant alleges that, in point of fact, no resolution or order has ever been adopted by the Board of Supervisors; must the Court decline to hear him? Suppose the Court hears him, and the proof establishes his allegation; must the Court go on and confirm the report? Would the learned counsel opposite contend that the County Court might make a finding to the effect that no resolution or order, as provided by Section 21 of the Act, was ever adopted by the Board of Supervisors, but that, as the Court has naught to do with that question, and as the report is, in other respects, quite in accordance with the provisions of the statute, therefore it should be confirmed and

the Board should proceed to widen the street? Would they contend that a judgment based upon such a finding would not be erroneous upon its face? Would they contend that, if appeal was taken, upon that finding alone, to the Supreme Court, that that Court should not reverse, but must affirm the judgment?

I do not conceive that such a proposition can, for a moment, be maintained. The contestant may, under section eight, file a petition "setting forth his interest in the proceedings had before the Board, and his objections thereto." The Board answer. A day is then set for hearing. "Testimony may be taken by said Court upon said hearing, and the process of the Court may be used to compel the attendance of witnesses, and the production of books or papers or maps in the custody of said Board or otherwise." Why, under these provisions, may not a contestant object that no order or resolution has ever been adopted by the Board of Supervisors?

The County Court, say the learned counsel, has no authority to determine that there ever was any such order or resolution. Nor, consequently, would the Supreme Court have, in case of an appeal. These Courts have, it is asserted, absolutely nothing to do with the matter. They must leave the question where they find it—to remain open during the twenty years that the bonds have to run, to be

agitated as against each and every bondholder demanding payment of interest or principal. It is inconceivable that this is the meaning of the statute. To so hold, is to credit the Legislature with the authorship of a scheme of unparalleled folly.

The Board of Commissioners, it is said, have no power to organize—do not become an organic body—unless a proper order or resolution has been adopted. If none is so adopted, they have no right, it is affirmed, to do anything. The report of the Board is, if there had been a proper order or resolution, the official act of a legally constituted body. If, on the other hand, there has been no such order, the report is a nullity, and the three persons named are officious intermeddlers. Now, when these three persons present to the Court a report, purporting to be a report of a Board of Commissioners, may not the Court inquire who and what they are? They call themselves the Board of Commissioners; but is the Court bound to take their word for it? They are such a board, if a proper order or resolution has been adopted; if not, they are not. May not the Court, then, ascertain whether such an order or resolution has been adopted? If not, how does the Court know that it is dealing with an authorized public body?

The Court is called upon to confirm a document before it, which is styled a report of the Board of Commissioners. Such a report, it is asserted, is

unauthorized by law—is a nullity—unless preceded by a proper order or resolution of the Board of Supervisors. May not the Court, then, ascertain whether the report is a thing that has a legal existence? If the only way of ascertaining is to examine the sufficiency of the order or resolution, will not the Court make the examination? Must the Court blindly accept what is presented to it, without inquiring into its legal quality?

I submit, that the final judgment of the County Court, confirming the report, is necessarily an adjudication that the report is authorized by law; that if, in order to its being authorized by law, it must be preceded by a given order or resolution, then, the judgment is an adjudication that such order or resolution existed. I submit, further, that the final judgment is necessarily an adjudication that the report is the report of a body authorized by law; that, if to the legal existence of such a body, a given order or resolution is necessary, the judgment is an adjudication of the existence of such an order or resolution.

The above contentions are well illustrated by the case of *Gage* vs. *Parker*, 103 Ill., 528, 535.

It was an application to set aside a sale of certain lands for the payment of a delinquent sewerage assessment, imposed thereon, by the town of Hyde Park, in conformity with the provisions of the Illinois General Act in relation to cities,

villages and towns. (Ill. Rev. Stat., 1883, Ch. 24, Art. 9,) and an ordinance of said town, adopted in pursuance thereof.

The statute under which the assessment was levied, provided as follows:

Sec. 1.—"The corporate authorities of cities and villages are hereby vested with power to make local improvements by special assessment, or by special taxation or both, of contiguous property, or by general taxation or otherwise as they shall by ordinance prescribe."

Sec. 2.—"*When any such city or village shall by ordinance provide for the making of any local improvement, it shall by the same ordinance prescribe whether the same shall be made by special assessment or by special taxation of contiguous property, or by general taxation, or both.*"

Sec. 19.—"*Whenever such local improvements are to be made wholly or in part by special assessments, the Common Council in cities * shall pass an ordinance to that effect, specifying therein the nature, character, locality and description of such improvement.*" * *

Sec. 20.—"The City Council or board of trustees * * shall appoint three of its members or any three other competent persons, who shall make an estimate of the cost of the improvement contemplated by such ordinance, including labor, materials and all other expenses attending the same, and the cost of making and laying the assessment, and shall report the same in writing to said council or board of trustees."

Sec. 21.—"On such report being made, and approved by the Council or board of trustees, * * * *it may order a petition to be filed by such officer as it shall direct, in the County Court of the County, for proceedings to assess the cost of such improvement, in the manner provided in this Act.*"

Sec. 22.—"The petition shall be in the name of the corporation and shall recite the ordinance for the proposed improvement and the report of such commission, and shall pray that the cost of such improvement may be assessed in the manner prescribed by law."

Sec 23.—"Upon the filing of such petition, the Court shall appoint three competent persons as Commissioners who shall take and subscribe an oath" (giving its substance.)

Sec. 24.—The Commissioners shall examine the locality where the improvement is proposed to be made, and the lots, &c., that will be specially benefited thereby, and estimate the proportion of said improvement that will benefit the public, and that will be beneficial to special property, and apportion the same between the city * and such property, and assess the special benefits to the lots and tracts specially benefited. Provided, no lot &c., shall be assessed more than it is actually benefited.

Sec. 26.—"*They shall also make or cause to be made an assessment roll*, in which shall appear the names of all the owners as far as known, a description of each lot, &c., and the amount assessed as special benefits thereto, and in which they shall set down as against the city * the amount they shall have found of public benefit, *and certify such assessment roll to the Court by which they were appointed at least ten days before the first day of the term at which a final hearing thereon will be had.*"

Sec. 27.—"It shall be the duty of Commissioners to give notice of such assessment and of the term of Court at which a final hearing thereon will be had, in the following manner."

1. They shall mail notice to each known owner, stating that his property, describing it, is assessed at such and such a sum, and the assessment will be returned to such and such a term of the County Court.

2. They shall give notice by posting for ten days in at least four public places of the city or village, two in the neighborhood of the improvement, and by publishing for five successive days in a daily newspaper of the city or village, if any, or if there is no daily, then once a week for two weeks in a weekly paper, or if no weekly or daily paper is published in the village or city, then in a newspaper of the county which notice may be substantially as follows:

"Notice is hereby given to all parties interested, that the City Council of ———, having ordered that (here insert description of improvement as in ordinance,) have applied to the County Court of ——— County, for an assessment of the cost of said improvement according to benefits, and an assessment thereof

having been made and returned to said Court, the final hearing thereon will be had at the —— term of said Court, commencing on ——-——. All persons desiring may then and there appear and make defense."

Sec. 28.—The Commissioners shall, before final hearing establish the mailing and publication by affidavit.

Sec. 39.—*Any person interested in real estate to be affected by such assessment, may appear and file objections to such report,* and the Court may make such order in regard to the time of filing such objections as may be made in cases at law in regard to the time of filing pleas. As to all lots, blocks, tracts and parcels of land to the assessment of which objections are not filed within the time ordered by the Court, *default* may be entered, and the assessment confirmed by the Court.

Sec. 31. *On the hearing, the report of the Commissioners shall be competent evidence, and either party may introduce such other evidence as may tend to establish the right of the matter. The hearing shall be conducted as other cases at law, and if it shall appear that the premises of the objector are assessed more or less than they will be benefited, or more or less than their proportionate share of the cost of the improvement, the jury shall so find, and also find the amount for which such premises ought to be assessed, and judgment shall be rendered accordingly.*

Sec. 33. *The Court before which any such proceeding may be pending shall have power at any time before final adjournment (judgment) to modify, alter, change, annul or confirm any assessment returned as aforesaid, or cause any such assessment to be recast by the same Commissioners whenever necessary for the attainment of justice, * or may appoint other Commissioners in the place of all or any of the Commissioners first appointed, for the purpose of making such assessment, or modifying, altering, changing or recasting the same, and may take all such proceedings, and make all such orders as may be necessary to make a true and just assesment of the cost of the improvement according to the principles of this act, &c.*

Sec. 34. Provides that the judgment shall have the effect of a several judgment, as to each tract, and *any appeal* or *writ of error* shall not stay the judgment unless as to property concerning

which the appeal is taken. The judgment shall be a lien from its date.

The ground upon which the assessment and the sale thereunder were attacked was that the ordinance which initiated the proceedings was not in conformity with the statue, and, consequently, that the whole proceeding was illegal and void. The question for decision was whether such an objection could be made after the County Court had confirmed the assessment.

The Court said, [p. 535]:

"The 19th Section of Article 9 of the Act in relation to cities, villages and towns, under which the town of Hyde Park passed the ordinance, declares: 'Whenever such local improvements are to be made wholly or in part by special assessment, the council in cities, or boards of trustees in villages shall pass an ordinance to that effect, specifying therein, the nature, character, locality and description of such improvement.' It is contended that this ordinance did not comply with the requirements of the section of the statute (*supra*,) and hence the assessment was illegal, under the ruling of this Court in *Lass* vs. *Chicago*, 56 Ill., 354, and other like cases. We shall not, however, stop to pass upon the validity of the ordinance, as complainant is not in a position to question its validity. *It appears that the assessment was made under the ordinance, and a return made to the County Court of Cook County, where* * * * *after due notice, it was confirmed, except as to the land of certain persons who appeared and filed objections, complainant not being one of them. Is complainant concluded by the judgment of confirmation?*

"In *People* vs. *Brislin*, 80 Ill., 423, where it was contended that the assessment was illegal, because not levied on contiguous property, it was said: '*This question and all others bringing up the levy and assessment have been passed upon by the Circuit Court, and are res adjudicata, and cannot now be made in this Court. Upon these there is a judgment passed by a Court of competent juris-*

diction, and there they must rest.' This case has been followed by a number of other decisions where the same doctrine has been announced. * *

"IF THE ASSESSMENT WAS ILLEGAL FROM THE FACT THAT IT WAS BASED UPON AN INSUFFICIENT ORDINANCE, IT WAS THE DUTY OF THE COMPLAINANT IN THE BILL TO APPEAR BEFORE THE COUNTY COURT WHEN THE APPLICATION WAS MADE TO CONFIRM THE ASSESSMENT, AND THERE MAKE THE OBJECTION; BUT AS HE FAILED TO DO SO, THIS JUDGMENT OF THE COUNTY COURT, WHEN CALLED IN QUESTION COLLATERALLY, MUST BE REGARDED AS CONCLUSIVE."

(c.) All that I have said with reference to the conclusiveness of the judgment of the County Court as to the existence and proper adoption and passage of the resolution or order of the Board of Supervisors, is equally applicable to the notice required to be published by the Board of Commissioners under Section 7. If it was essential to the legal validity of the judgment of the County Court that that notice should be given, then the Court had authority to examine and determine whether it had or had not been so given. It did so determine and adjudge (fol. 968); and its judgment upon that point is final and conclusive.

(*d.*) Equally applicable is it, I submit, to all the alleged irregularities and defects, which are pointed out in the assessment and report made by the board. These are all adjudicated and set at rest by the judgment of the Court:

1. It is urged that "the assessment is void, because it conclusively shows that the cost exceeded the benefits."

It may be admitted, for the purpose of this argument, that the rule of law, constitutional or statutory, requires that the cost should not exceed the benefits. It may be further admitted, that an assessment that violates this rule is erroneous in point of law, and should be corrected by those who have authority to declare the law—the Courts of the land having jurisdiction of the subject. But, suppose the Court having jurisdiction approves the error, and consecrates it by a solemn and final judgment; then, we simply have an erroneous judgment, which, when it becomes final, is, for all the purposes of that case, as valid and binding upon the parties as a legally correct judgment.

Suppose an appeal had been taken to this Court from the judgment of the County Court finally approving and confirming the assessment; and suppose the point had been made here, that the assessment was in violation of law for the reason just stated; and suppose this Court had affirmed the judgment of the County Court; would any one contend that that judgment could be thereafter attacked and nullified, because a subsequent Court might be entirely satisfied that the judgment is, in point of law, erroneous? Is not such a judgment a complete protection to all who act under it? Is the purchaser of the bonds of the city, who bought them upon the strength of the solemn judgment of the Court, decreeing that

these proceedings are according to law, and are approved by the authorized ministers of the law, to suffer loss, because the Court committed an error of law in pronouncing judgment? Must a person who acts under a judgment, know the law better than the Court which pronounces it?

I submit, that it is too plain for argument, that, if the Court had jurisdiction of the matter and the parties, its judgment cannot be collaterally attacked, however gross the error upon its face may appear.

2. It is claimed that "the assessment is void also, because based upon a rule so glaringly erroneous and flagrantly unjust as to amount to actual fraud upon the taxpayers;" and that "a different rule of value was knowingly adopted with respect to the property of those objectors who obtained modifications in the County Court from that which was applied to other property," and that "the aggregate amount of it was increased far beyond the actual or pretended cost or damage incident to the improvement by arbitrary additions wholly unwarranted by law;" and that "the assessment * * * was delegated to experts and arbitrators, and was not, in fact, made by the Commissioners at all;" and that the proceedings were conducted with "indecent haste."

How it can be imagined that any of these things, supposing them to be true, afford the basis

for a collateral attack upon the judgment of a Court, approving and confirming this assessment, I confess myself at a loss to understand. The learned counsel appear wholly to ignore the fact that this is not a direct attack upon the assessment. They seem to close their eyes to the fact that that assessment has passed into judgment, and is upheld by a decree of a court of record of competent jurisdiction. The very object of the statute in bringing this assessment before a Court was to afford an opportunity to free it from all imperfections and errors. When it has received the final approval of the Court, no one can, thereafter, impeach it for error; for it is, in contemplation of the law, perfect.

We may say here, as the Court said, in *Reclamation District* vs. *Hagar*, 4 W. C. R., 284, that all these things were "necessarily determined by the trustees (Commissioners) in the statement to the Board of Supervisors (County Court) to have been proper, and such as the law contemplated, and by the Board of Supervisors (County Court) in making the order for the assessment, and neither the determination of the trustees, (Commissioners) nor that of the Board of Supervisors (County Court) can be contradicted or impeached in this suit."

Further light is shed upon this question by the following decisions.

Under the laws of Virginia, (Va. Code of 1860, Ch. 56, Sec. 6, et seq.,) it was provided that the County Court, shall, in the event that a company, organized for a work of internal improvement, or a county or town, cannot agree with owners of land needed for purposes of improvement by such company, county or town, appoint Commissioners to assess the damages. Ten days' notice shall be given of the application, by service on the tenant of the freehold, and by posting and publishing in a prescribed manner, if there is no tenant in the county or corporation. The Commissioners, after being sworn, shall examine the land and hear evidence, and determine what will be just compensation, making their report, in a form set forth, reciting their appointment and its purpose, the time of their meeting and its adjournments, a description of the property, and assessing the amount of damages sustained, over the benefit enuring from the improvement. This report and certificate shall be returned to the County or Corporation Court, "and *unless good cause be shown against the report, the same shall be confirmed and recorded.* * * If, however, good cause be shown against the report," or if Commissioners disagree or fail to report in a reasonable time, the Court may appoint other Commissioners, &c.

In *Washington* vs. *Switzer*, 26 Grattan, 661, 664, the question arose as to how far the confirmation of the report, under this statute, was conclusive against objections to it. The case is an authority showing the great latitude which is afforded for objection at the time of the confirmation of the report, the parties affected not being confined to the point that the award of damages is too high or too low, but being at liberty to raise every other objection that may validly be urged against the confirmation.

It was there said:

"The Court is of opinion that when the report of Commissioners * * * is returned to the County or Corporation Court, *either party may show cause against its confir-*

mation, upon the ground of excessive or inadequate compensation and damages, improper conduct of the Commissioners in refusing or failing to hear legal and proper evidence, or by proof of ANY OTHER FACT, TENDING TO SHOW THAT SAID REPORT OUGHT NOT TO BE ADOPTED."

Alexander vs. *The Mayor*, 5 Gill., 383, was a bill in chancery to enjoin the collection of an assessment for the improvement and extension of a public street. The ordinance under which the assessment was made provided for an appeal from the Commissioners to the Baltimore City Court.

The objections urged against the assessment were that the Commissioners failed to assess all the property benefited, omitting one street entirely; and that they omitted certain church property, and unjustly and arbitrarily and without reference to the special benefits received by other persons, imposed upon and apportioned among them the tax that should have been levied upon such exempt property, and that they otherwise proceeded arbitrarily, irregularly and oppressively.

The Chancellor refused the injunction, holding that for the alleged improper conduct of the Commissioners redress might have been had by appeal.

Said the Appellate Court, at p. 398:

"It is perfectly clear that the Court of Chancery has no jurisdiction to supervise or re-examine the proceedings and judgment of the City Court with respect to these assessments. * * And we think that the order of Chancery refusing this injunction was correct and must be affirmed."

People vs. *Brislin*, 80 Ill., 423.

This was an application for judgment against certain lots benefited by the laying out of a park, for assessments imposed thereon by the corporate authorities, and which the owner had suffered to become delinquent.

By the Act under which the park was created it was provided, that a Board of Park Commissioners should have control of the improvements, and should make a special assessment to maintain them upon the contiguous property adjudged by them to be specially benefited thereby; and that when completed they should file their assessment with the Clerk of the Circuit Court of the County, and give notice of such filing, and of an application to the Court for confirmation; and that the Court thereupon, after proof of due notice, should have power to hear and determine such application.

Under this Act the Commissioners made their assessment roll, which they duly reported to the Circuit Court and filed with the Clerk, and the assessment was thereafter duly confirmed.

The finding of the Court was as follows:

"That all the preliminary steps had been taken by the corporate authorities, and that the assessment was made in proportion, as near as may be, to the benefits resulting from the improvement to each separate lot, block or parcel of land mentioned in the assessment roll, and that all and every of the proceedings of the Commissioners in the premises were regular, valid and in conformity with law, and that they have done all things required

of them by law to make this special assessment a legal, just, valid and binding assessment, in whole and every part thereof, and that the same and every part thereof was a just and fair assessment in the premises."

The Court, in delivering its opinion, said:

"The point is pressed, that this assessment is not on contiguous property. This question and all others bringing up the levy and assessment, have been passed upon by the Circuit Court, and are *res adjudicata*, and cannot now be made in this Court. *Upon this there is a judgment pronounced by a Court of competent jurisdiction, and there they must rest.*"

Andrews vs. *The People*, 84 Ill., 28, arose under the same statutes as those referred to in *People* vs. *Brislin*, the Park Commissioners making the assessment roll, and referring it to the Circuit Court of the County for confirmation.

The Court, at page 33, said:

"It is * urged that the assessment is void, because it does not appear from the proceedings that the property is benefited to the amount assessed thereon." (Precisely the same objection as that raised here, that the costs exceeded the benefits.) "The assessment was confirmed by the Circuit Court, a Court of competent jurisdiction. No appeal has ever been taken from that judgment, and, in a proceeding to collect the amount found by the decree of the Circuit Court, the question raised must be considered *res adjudicata*."

It was likewise urged that the Commissioners had no power to apportion the entire assessment,—as they did—into certain sums, payable annually; that they were authorized to make only one apportionment, and when that for the first year was fixed, their authority was exhausted.

"But, were it otherwise," said the Court, at p. 35, "the appellants cannot go behind the confirmation of the assessment

made by the Circuit Court, or take advantage of such defects in a collateral proceeding."

Prout vs. *The People*, 83 Ill., 154, 158.

Application for judgment and order of sale of land for the collection of a special assessment. The ordinance under which the work of improvement was done, contained forty distinct sections, each providing for a separate and distinct improvement and assessment. It was objected that the assessment rolls under each of the sections of the ordinance were presented to the Court for confirmation at the same time, and were all confirmed by one and the same order, and in a single proceeding.

The Court said:

"If there were error in the hearing on confirmation of all the assessment rolls at one time, which is by no means admitted, it would not render the order of confirmation void. The objection should have been raised in the proceeding where the error was committed, and cannot be heard in this collateral proceeding."

In *Lehmer* vs. *The People*, 80 Ill., 601, which was an appeal from a judgment of the County Court of Cook County, rendered for a special assessment levied on certain lands benefited by the improvement of a street known as Parker's Avenue, and which was reported by the Collector to be delinquent, the Court said:

"It is now too late to inquire into the nature of Parker's Avenue,—whether public or private. That objection should

have been made, when application for confirmation of the assessment was made of which appellant had notice by publication. It is now *res adjudicata.* It must have been adjudged a public street when the order of confirmation was entered, and there is no appeal from that."

Blake vs. *The People*, 109 Ill, 504, was an appeal from the judgment of a County Court, in favor of the collector of the County against a certain tract of land, for the amount of a special assessment imposed thereon for drainage purposes. The statute, under which the assessment was made provided for the formation of a drainage district. After the district was created, it provided that a jury should be impanelled to assess the damages and benefits, that they should make an assessment roll, showing the amount of damages and benefits sustained by each land-owner affected, that, after its completion they should fix a time and place, when and where they would attend for its correction, and *that the Commissioner or the jury should give ten days' notice of such time, by posting and publishing notices, prior to the time, &c.*, that they should thereupon hear objections and correct or confirm said assessment roll, and thereafter return it to the Court, where it should again come on for hearing at the next term.

It was urged as an objection to the proceedings that the notices prior to the confirmation of the assessment roll by the jury, were not given as required by the statute.

The Court held that the land-owner was not entitled to raise the point in this collateral proceeding—that he was concluded by the confirmation of the assessment. It was said:

"*All objections which could have been urged at the time of the confirmation of the assessment roll and which were not then urged, must be considered as waived, and cannot be urged for the first time on application for sale of lands for a delinquent assessment.* Such has been the repeated ruling of this Court in cases of special assessments for the opening, repair and improvement of streets, and there is no difference in principle between those cases and the present."

Matter of Widening Broadway, 61 Barb., 483. This was an appeal from an order setting aside the order of confirmation by the Supreme Court of a special assessment for widening Broadway in the City of New York. The Commissioners of estimate and assessment, returned their report to the Supreme Court, where it was confirmed. The Judge, at special term, found that there had been error, mistake, irregularity and illegal acts in the assessment proceedings, and that the assessment of benefits and award of damages had been unfair, unjust, inequitable and oppressive as respected the City of New York, wherefore, the order of confirmation was set aside.

Said the Court at page 486:

"Supposing * that the order of confirmation when made was not appealable, can the Court entertain a motion to vacate it for error, mistake, irregularity or illegality? * * The order

of confirmation * * * is an order of the Supreme Court, not of any quasi-judicial tribunal, possessing limited powers. It is a final order made in a special proceeding. The Court has appointed certain officers to ascertain and report upon certain disputed facts, viz: the value of the property taken and the benefit accruing. These officers have reported to the Court, and the Court has confirmed the report. In what way does this order of confirmation differ, as to its finality, from a judgment of the same Court, entered on the report of Commissioners for interests in partition?"

3. It is earnestly urged that "the assessment is rendered void, also, by the fact that one of the Commissioners and one of the experts who made the appraisement were personally interested in the property affected by the assessment."

The interest of the Commissioner, if it was a disqualification, might have been urged in the County Court in opposition to the confirmation of the report. It can not be urged now to overthrow the judgment of that Court.

Matter of Southern Boulevard, 3 Abb., Pr. (N. S.) 447.

Motion to confirm the report of Commissioners of estimate and assessment—appointed by an act laying out a highway.

"It is urged," said the Court, "that one of the Commissioners owned some lots, which have been taken for the improvement, and was therefore incompetent to act, upon the maxim that no man can be judge of his own cause. * * There are, however, I think, several answers to it. One is, that the maxim does not govern the case. It applies to judicial officers but not to officers whose duties partake of an administrative

character, and are only quasi judicial, (People vs. Wheeler 21 N. Y., 82.) In this case, Denio, J. says: "An act of public administration, though requiring the exercise of judgment; is quite a different thing from the dispensing of justice between man and man. If this objection should prevail, assessors, highway commissioners, tax commissioners, and many other boards of public officers, would be incompetent to act, and it would be impracticable to exercise some of the most important functions of the government. The public interest is supreme. Whenever compatible with this, officers like the one in question, should be disinterested. It rests exclusively with the Legislature, however, to determine whether in cases like this, interest shall disqualify. The Constitution provides, that compensation for private property, taken for public use, shall be ascertained by a Judge or by Commissioners, as shall be prescribed by law. * In this case, the only qualification for the Commissioners prescribed by the Statute is, that they shall be residents of the County. * * * Furthermore, the objection should have been made at the hearing of the application for the appointment of Commissioners. Consent, or at least a waiver of the objection may be fairly inferred, from an omission to make it at the proper time. In such a case it would, * be monstrous to hold, that the mere presence of the interested Commissioner, vitiated the proceedings."

In *People* vs. *Brislin*, 80 Ill., 423, 433, the Court said:

"The fact that the Commissioners who made the estimate and assessments were property owners in the towns, could not disqualify them. They were made by the law the tribunal for the purpose, and were required to take an oath faithfully and impartially to discharge their duties for the public interest. We are of opinion they were not disqualified; the law appointing them, qualified them."

In *State* vs. *Nelson*, 57 Wisc. 147, 154, Commissioners were appointed by the order of the

County Court, to review the action of a Board of Supervisors refusing to alter a highway.

"It happened," said the Court, "that one of the three Commissioners thus selected was one of the petitioners for the alteration of the highway. This settled that he was not disinterested, within the meaning of the statute, and was, therefore, not qualified to act as a Commissioner. It does not appear that any objection was made to his competency before the County Judge. Because there was no objection thereto, such selections did not invalidate the proceedings. * * Even if objection in such case be taken in due time, it will not invalidate the proceedings of the Commissioners, when attacked collaterally."

In *Matter of Central Park*, 16 Abb. Pr., 56, 70, Commissioners of appraisal were appointed, in conformity with N. Y. laws of 1859, Ch. 101, to assess adjoining property in New York City for the benefits resulting from the laying out of Central Park. It was contended that all the proceedings in the case were void, inasmuch as one of the Commissioners was appointed in direct contravention of the terms of the Act, providing that no interested party should be appointed. It appeared that he held a mortgage on some of the lands affected. *Held:* The objection should have been taken at the time of the appointment of the Commissioners. It was too late to urge it, or application to confirm the report.

Said the Court:

"The papers show that one of the Commissioners held a mortgage on some property on 47th street. * * The provision of the statute in regard to interest is merely directory. It may have been if valid, a good reason to apply for a change

of the Commissioner, but was not a jurisdictional matter to affect the validity or regularity of the proceedings."

Pittsburg vs *Cluley*, 74 Pa., St. 262, 4, was a *scire facias* upon a municipal claim for $133 by the City of Pittsburg against defendant, for opening a certain street.

An assessment was made by receivers of the damages and benefits resulting from the opening, and reported to and approved by the council, and thereafter an appeal was taken by an interested party to the Court of Quarter Sessions and the assessment was confirmed.

It was urged by defendant that one of the receivers was not a freeholder, as required by the statute.

"If," said the Court, "the assessment was not valid, it can no more be collaterally questioned or impeached on the ground that one of the receivers was not a freeholder, than a judgment or verdict, because one of the jurors by whom it was found, was not qualified to serve. *The confirmation of the report has all the legal effects and incidents of the judgment or decree of a Court of competent jurisdiction—one of which is, that it must be treated as valid and binding until reversed or set aside, and cannot be assailed except for fraud or collusion.*

"The only complaint is that one of the receivers by whom (the assessment) was made, was not a freeholder. This objection would have availed, if it had been made in time. But it comes too late, and cannot be set up here. *The confirmation of the report must be regarded as conclusive of the assessment.*"

In *Williams* vs. *Mitchell*, 49 Wis., 284, 290, an action of trespass, the defendant justified on the ground that he was lawfully remov-

ing obstructions from a public highway. It was denied that the *locus in quo* was a public highway, the proceedings purporting to lay out the same, being for various reasons void. One of the main objections urged was, that the Commissioners for altering the road, were signers of the petition for the alteration, and consequently interested parties.

Lyon, J., said: "Were the Court reviewing the proceedings of the Commissioners on certiorari, brought in proper time, it is very probable that their determination would be reversed, because the justice * appointed Commissioners who were not disinterested. But this is an irregularity only, and not jurisdictional. * Being merely an irregularity, it is not available in a collateral action. Although the Commissioners were not disinterested, their determination is not, therefore, void, but is valid and conclusive until assailed in a direct proceeding to set it aside. This is not such a proceeding; and therefore in this action, it must be held that such determination is valid."

Brock vs. *Hishen*, 40 Wis., 674, was also an action of trespass and for an injunction, the defendants justifying on the ground that the *locus in quo* was a public highway, and that they entered upon and were tearing down fences, &c., on the same, for the purpose of opening the highway, under the direction of the proper town officers. On motion to dissolve the injunction it appeared, that a petition was presented to the Supervisors for the laying out of the highway—that they heard the same and determined not to lay it out—that, on the application of a land-owner affected thereby, Commissioners were appointed to review the determination

of the Supervisors, which resulted in a reversal of the former order, and in an order to open the highway. It was urged that one of the Commissioners was an interested party, and that this vitiated the proceedings.

Said the Court: "The name of the petitioner who had previously acted as a Supervisor in the matter of the same highway, should have been stricken from the list, had the objection been taken when the Commissioners were selected. We cannot say that one who had previously decided, under the sanction of his official oath, that the highway ought to be laid out, was disinterested, within the meaning of the statute prescribing the qualifications of such Commissioners. But we think the objection comes too late. It is not unlike the case where an incompetent juror is permitted to be sworn in a case without objection. Whether the fact be known or unknown to the defeated party, such incompetency is not ground for reversing the judgment. In some cases it is not even ground for a new trial."

II. THE JUDGMENT OF THE COUNTY COURT IS A CONCLUSIVE ADJUDICATION IN ALL COLLATERAL ACTIONS THAT THE ACT ITSELF IS CONSTITUTIONAL.

In discussing the question, it ought to be borne in mind that the position which we take is not that ascribed to us by the learned counsel for the plaintiff. They assert [p. 57 of closing brief,] that our argument is that "a Court *created* by an uncontsitutional statute, and, therefore, not a Court at all, has nevertheless, power to determine conclusively or against collateral attack, that the statute is constitutional and consequently that it is a Court and has authority to adjudicate upon the matter committed to it by the statute; thus breathing into its

own dead nostrils the breath of life." Of course, this argument is absurd; but, it is not the argument which we present in this case. We say: The Court existed before and independent of this statute. It was created by the Constitution. It was a Court of record. Its proceedings were carried on with the formality and regularity which attend the acts of the highest Courts of original jurisdiction. It was, by the Constitution, given power to hear and determine special proceedings—a class to which the opening and widening of streets belong. When, therefore, parties came before it in a proceeding to widen a street, and claimed to act under and in pursuance of a statute of the State, it necessarily became the duty of the Court to determine whether it would entertain jurisdiction of and proceed in the matter. That question was judicial and the decision of it was a judicial act within the power of the Court to perform. The Court might decline jurisdiction on the ground that the statute which attempted to give it jurisdiction over that proceeding is unconstitutional, or it might entertain jurisdiction on the ground that the statute is constitutional. In this case the Court entertained the case and gave judgment therein, and our position is, that: In approving and confirming the report of the Commissioners, the County Court judicially declared it legally correct—conformable to the Constitution and laws.

Its judgment, though it may be erroneous, is conclusive on that point.

The only thing which brought the Court into relation with these proceedings and gave it any right or power to act therein, was the Constitution and the Dupont Street Act. The proceedings themselves belonged to a class of which, in proper cases, the County Court had jurisdiction. They were special proceedings under the Constitution. The Constitution, though conferring the jurisdiction in general terms, does not enumerate the particular occasions in which it shall be exercised. To do this a statute is required. There must be a law applicable to the particular case before the Court.

When contesting parties come before a Court and demand the exercise of its jurisdiction, may not the Court, at the very threshold, ask: Is there any law requiring the Court to take action in this matter? If, in response, a paper is produced purporting to be a statute, may not the Court then ask: Is this statute constitutional? It seems to me there can be but one answer to these questions. Would any one contend that, if a dissatisfied property-owner, on the line of Dupont Street, had come into Court, when the report was up for confirmation, to urge that the Dupont Street Act was unconstitutional, the Court must have refused to hear him? Would the proposition be maintained,

that, if the Court did hear him, and became entirely satisfied that the Act was unconstitutional and void, it would, nevertheless, have been bound to act and examine the report; and, if it found it in accordance with the void statute, confirm it? Would it be claimed that, if the County Court did, under such circumstances, confirm the proceedings, and appeal was taken to the Supreme Court, that that Court would have no authority to decide that the Act was unconstitutional and dismiss the whole proceedings as null and void? These questions cannot be debated. To state is to answer them. Courts are the ministers of the law. If there is no law, they have no office to perform. When they act in a given case, the very first question which they necessarily determine is, that the law commands their action. It was said, and no doubt, well said, by this Court on an appeal from an order of the County Court confirming an assessment under a statute precisely similar to the present: "If the appellant had succeeded in convincing us that this is a case at law involving the legality of an assessment *we would have been compelled to hold that the Act conferring jurisdiction on the County Court was unconstitutional and void, and the whole machinery for enforcing the assessment would have fallen with the Act.*" [1]

[1] Houghton's Appeal, 42 Cal., 57.

Suppose, then, that an appeal had been taken in this case and that, on behalf of some dissatisfied property owner, the learned counsel, who has just addressed your Honors, should have urged before that Court all his present objections to the constitutionality of this Act, and supported them by the same learned argument which we have heard; and suppose the Supreme Court had, upon mature deliberation, delivered a judgment overruling all these objections and expressly determining the Act to be constitutional, would any one contend that the validity of the Act would not have thus become *res adjudicata* and forever placed beyond dispute? If the Board had issued these bonds, after such a decision, and a purchaser in good faith, had bought and paid for them, would any one contend that the question of the constitutionality of the Act could, as against him, be again agitated? Would not the judgment of the highest Court of the State, rendered in the proceeding itself, afford him the same protection which final judgments always afford to those who act under them? When he came to collect his bond, would he again have to maintain the constitutionality of the Act, which the Supreme Court had, in that very case, declared constitutional? Neither reasoning nor authority is required to answer these questions; they answer themselves.

But, suppose the question of the constitutionality

of the Act had not been expressly debated in the Supreme Court, but that Court had, nevertheless, finally approved and confirmed the proceedings, would its judgment, so far as the constitutionality of the statute is concerned, be any the less conclusive? Clearly not; for, as between the parties to an action, a final judgment is conclusive of every question of law and fact which might have been litigated, whether, in point of fact it was litigated or not. Take a simple illustration: A sues B to collect a money demand arising under a statute. He obtains a judgment, which is finally affirmed on appeal to the Supreme Court. Execution issues. B's land is sold and bought in by C, who obtains a Sheriff's deed. In a subsequent case, arising under the same Act, the point is, for the first time, made in the Supreme Court, that the Act is unconstitutional, and the Court so holds. Does the second decision affect C's title? Is the judgment, under which he deraigns title, any the less valid, because an examination of the arguments may reveal the fact that counsel neglected to call the Court's attention to the fact that the Act was in violation of the Constitution? Would the judgment have been any more effective for C's protection, if the objection to the constitutionality of the Act had been expressly made and overruled by the Court? Obviously not.

But, the judgment of the County Court, if un-

appealed from, is just as final and conclusive upon every question as the judgment of the Supreme Court. No one would contend that, if the question of the constitutionality of the Act can be raised in the Supreme Court, it can not be raised in the County Court.

I contend that the judgment of the County Court was equally conclusive of the legality of the proceedings, whether it was rendered by default or upon appearance and contest. The illegality of the proceedings—if they were illegal—the unconstitutionality of the Act—would have afforded a complete defense to the demand for judgment made against the property-holders in the County Court. If, being cited to appear, they permitted judgment to be taken against them by default in a Court which, under the Constitution had jurisdiction of the subject matter, they stand in the position of those who, having a perfect defense to an illegal demand, neglect or refuse to make it. It is too late, after a judgment is pronounced, to claim the benefit of that defense in a collateral proceeding. If they did appear and, having urged their defense, the Court found against them, they are none the less bound by the judgment, because, in a collateral proceeding, it may conclusively be shown to be erroneous.

I conclude, therefore, that the final judgment confirming the report of the Board was an adjudi-

cation that the proceedings were legal—that the Act under which they were taken was constitutional.

The contention which I make under this head is well illustrated and fully supported by the decision of the Court of Appeals of New York, in 1877, in the case of *Hallock* vs. *Dominy*, 69 N. Y., 238. The facts were these:

A Justice of the Peace pronounced judgment *by default* against a defendant in an action to recover a penalty. Process being issued under the judgment, the defendant in that action brought trespass. The justification was the judgment of the Justice. In reply, it was contended that the Act imposing the penalty was unconstitutional. The Court of Appeals, not deciding, but assuming the Act to be unconstitutional, held the judgment of the Justice to be valid, and said:

"The Justice of the Peace had jurisdiction of the subject matter of the action, being for the recovery of a penalty less than two hundred dollars (Code, § 53.) He had jurisdiction, by the personal service of a summons, of the defendant therein, the present plaintiff, and no objection was taken to the form or the regularity of the proceedings. *The jurisdiction of the magistrate was not derived from, and did not depend upon, the Act which is challenged, but upon the general statutes of the State.* HE HAD JURISDICTION TO PASS UPON EVERY QUESTION INVOLVED IN THE ACTION, INCLUDING THE VALIDITY OF THE LAWS IMPOSING THE PENALTY. *The judgment so long as it remains unreversed, was for every purpose as conclusive between the parties, and upon every question necessarily embraced in the judgment, as would have been that of the highest Court of record in the State.*"

Precisely the same question arose under the same state of facts, and was decided in the same manner by the Supreme Court of Kentucky in 1837, in the case of *Arnold* vs. *Shields*, 5 Dana, 18.

"In our judgment," said the Court, "if the unconstitutionality of the Act of 1836 be admitted, nevertheless, the magistrate below had jurisdiction to decide on the cases brought before him, *involving the validity of the statute*, and the consequential right to the sums of money claimed under it. * * * The magistrate having jurisdiction over the subject matter (debt on implied contract) and the amount (fifty dollars) had a right to decide whether the penalty sued for was *legally* recoverable, or in other words, *whether the statute under which it was claimed was valid or void*, and that, if the statute be unconstitutional, that fact does not show that the magistrate had no jurisdiction over the suit, but would prove only that his judgment was erroneous. * * * In this case the magistrate having a general jurisdiction over demands *ex contractu* amounting to not more than fifty dollars, the only question was, not, whether he could adjudicate upon the warrant, but how he should decide—and consequently, *he had a right to adjudicate and, therefore, to decide whether the statute, in virtue of which the sum of fifty dollars was claimed, was binding or void.*"

The analogy of these cases with the present is patent: The County Court had, under the constitution, general jurisdiction of special proceedings. Power to act in and decide that class of cases, it derived, not from the statute, but from the constitution. When, therefore, an act relating to a special proceeding was brought to its attention, and its judgment upon the steps taken under it was invoked, it had a right to decide whether those proceedings were legal, that is, whether the

Act under which its judgment was claimed was valid or void, constitutional or unconstitutional.

The argument that I have made upon the absolute conclusiveness upon all points of the judgment of the County Court is, I submit, not only fully supported by the reasons adduced and the authorities cited, but is the logical and inevitable result of the positions assumed and the concessions made by the learned counsel opposite.

They claim and assert under the Constitution, "that the right of these tax-payers to notice and a hearing upon this assessment, before it became final, extended to the whole assessment and included *every possible objection to it*;" they had "a right to be heard *as to the validity of the statute authorizing the assessment, the authority of the board to make it, their fraud, misconduct, and errors in making it, the equality and fairness of it, and the justice and propriety of the changes made in it, after it was reported so far as it affected his liability.*"

This right to this complete hearing, I fully admit. The constitution gives it and the statute does not attempt to, and could not if it did, take it away. But, surely, it will not be contended that the judgment of a Court of record, whether by default or after trial, is not, in all collateral proceedings, conclusive upon every question on which

the parties had a right to be heard before the Court.

IV.

THE BONDS ISSUED UNDER THE ACT ARE NEGOTIABLE, AND HAVE ALL THE QUALITIES AND PRIVILEGES OF COMMERCIAL PAPER, AND THE INTERVENORS ARE BONA FIDE HOLDERS THEREOF.

In discussing this point, it will be assumed, for the purpose of argument, that the bonds are valid.

They are bonds of the City and County of San Francisco, of $1000 each, payable in twenty years, bearing interest at seven per cent. per annum. (Sec. 9.) They are to be disposed of to the highest bidder, at not less than ninety-five cents on the dollar. (Sec. 11.) They are to be paid, principal and interest, by a tax annually levied upon the district declared by the Act to be benefited by the improvement. (Sec. 13.)

The character of these bonds, whether they are negotiable or not, depends, of course, upon the meaning of the Act under which they were issued. Did the Legislature intend to make these bonds non-negotiable? To have done so, would have been to destroy or radically impair the value of the bonds, and to frustrate the objects which the Act had in view. That the negotiability of a bond, carrying with it all the intendments, presumptions

and protections which attend commercial instruments, adds to its value and salableness, is a proposition too obvious to need demonstration. That, at a time when the money markets of the world are replete with negotiable municipal bonds, the Legislature of this State should have purposely compelled the city of San Francisco to enter these markets as a competitor, with bonds clogged and impaired in their value by their non-negotiability, is to tax that body with purposeless folly.

The very nature of the bond, and the purposes which it was intended to subserve are in themselves conclusive evidence that the Legislature intended to make them negotiable. Upon this subject, the language of the Supreme Court of Mississippi, dealing with a similar statute, will be found instructive:

"In construing an act of the Legislature," says the Court, "we must look to its scheme, the object proposed to be accomplished, as an aid to the construction of any part of it, so that the entire law may be made harmonious in all its parts, and a consistent whole. Two objects are presented in the fifth section of the amended and supplemental charter. * * * Second, that costly and extensive improvements might be made of the character set forth in the second section. The scheme proposed for this accomplishment was the issuance of interest-bearing bonds, having a long time to run. * * * That object would be promoted by putting the bonds in such form as that they would be easily converted into money. That exigency could be met by making the bonds negotiable. But the city objects to the validity of the bonds, because the Legislature did not confer the power expressly to make them negotiable (all of them are payable to bearer). * * * The bonds * * * would be worth more, and

would realize more to the city * * * if they were invested with the privileges and immunities of commercial obligations. * * * One of the distinguishing features in the history of the internal improvements of the last quarter of a century, has been the vast stimulus and assistance furnished by municipal bonds. * * * By the same means have the cities been paved, sewered, supplied with gas and water, wharves, etc., to a great degree. Bonds thus issued bear interest, payable generally semi-annually, and have a long time to run, and are intended to be sold in the money markets as stocks and securities. They are designed to be placed in the money centers, in or out of the State, where money is most plenty and cheapest. Where, therefore, municipal bonds, bearing annual or semi-annual interest, with long maturities, are authorized to be issued for these, or such purposes, it must be presumed that the Legislature intended that they shall conform to the known usage; that they shall have that form and those incidents necessary to their availability. It is necessary that they should be negotiable, readily so; that each purchaser and holder should acquire a legal title, divested of all equities that might exist between the original parties. If they have not the characteristics of negotiable instruments under the law merchant, they would not be readily salable, and would not accomplish the object designed. Whether, therefore, the supplemental charter of the city, or the twentieth section of the act incorporating the V. P. & S. I. R. R. Co., authorized in specific and express terms the bonds to be made payable to bearer or not, *the right to put them in that form must be implied in the general power conferred.*"[1]

The general rule that municipal bonds are commercial securities will be found stated in:

1 Dillon on Municip. Corp. §§ 486, 513.

Jones on R. R. Securities, § 284.

2 Daniel Neg. Inst. § 1500.

Mercer County *vs.* Hacket, 1 Wall. ,83.

Thompson *vs.* Lee County, 3 Wall., 327.

[1] City of Vicksburg *vs.* Lombard, 51 Miss., 122–125.

Pana *vs.* Bowles, 107 U. S., 529.
Murray *vs.* Lardner, 2 Wall., 110.

But, it is said that the Dupont Street bonds are payable out of a special fund, created by law for their payment. It will be observed that, in the great majority of cases, the same statute which creates the bond, creates also a fund to be raised by taxation. Indeed, generally, the only way in which a municipality can meet its obligatons is through taxation. Suppose that the Legislature, here, instead of charging the cost of widening Dupont street upon a limited district, had imposed it upon the whole city, and had enacted that a tax should be annually levied, assessed and collected from the whole city, sufficient to pay the interest and a proportionate share of the principal of the bonds, and that the moneys so collected should be placed in a fund to be called the Dupont Street Fund; would that destroy the negotiability of the bond? No one would so contend. Does it make any difference that the tax is collected from a district only of the City? The whole of the property of the district is just as much bound to pay the bonds as the whole of the property of the City would be. It is urged that the whole property of the district may turn out to be inadequate. So it may be said that the whole property of the City may turn out to be equally inadequate.

The reports are full of cases where bonds have been issued by counties on behalf of unincorporated townships, where the property of the township alone was bound for payment, and the money was to be raised by a tax upon the township and not of the county at large. It was so held in :

Davenport vs. *The County of Dodge*, 105 U. S., 241.

Town of Queensbury vs. *Culver*, 19 Wall., 83

County of Cass vs. *Johnston*, 95 U. S., 360.

Jordon vs. *Cass County*, 3 Dillon, 185.

It has never been doubted that these bonds were just as negotiable as the ordinary county bonds.

The contention was made on the oral argument that the bonds were, at the start, the bonds of the City, and continued to be so until the completion of the work, when they changed their nature and became the bonds of the district. It was argued that the completion of the work was a contingency, and that a promise to pay which depends upon a contingency, is not negotiable. The case was likened to one where a township bond was to be converted into a county bond " whenever a certain injunction shall be finally dissolved." [Plffs'. brief, p. 98.] But there is no similitude. Here, the bond is from the beginning, and remains throughout, the bond of the City. [Sec. 9.] The only fund provided for its payment at any time, is the

tax to be levied upon the district. [Sec. 13.] There is no contingency whatever in the payment; no conversion of one bond into another at the option of the maker. In the case cited by plaintiff, [*Meriwether* vs. *Saline County*, 3 Dillon,] the Court said of the instrument which they held not to be negotiable: "It is not a promise to pay absolutely, but a stipulation for bonds thereafter to be issued."

V.

THE BONDS EXECUTED AND ISSUED BY THE BOARD OF COMMISSIONERS BEING NEGOTIABLE, THE RECITAL THEREIN THAT THEY ARE ISSUED IN PURSUANCE OF THE STATUTE, IS, IN FAVOR OF A BONA FIDE HOLDER, A CONCLUSIVE ADJUDICATION THAT EVERYTHING WHICH THE ACT REQUIRED THE COMMISSIONERS TO DO WAS DONE BY THEM; THAT IS, THAT ALL THE STEPS BETWEEN THE ADOPTION OF THE RESOLUTION OF THE BOARD OF SUPERVISORS AND THE JUDGMENT OF THE COUNTY COURT, WERE REGULARLY TAKEN.

Nothing is better settled, at the present day, than that, whenever officers executing municipal bonds, have, under the law, *power* to execute them upon the happening of certain contingencies, the execution by the officers of bonds, reciting that they are issued under or in accordance with the law, is, in favor of a *bona fide* holder, a conclusive

adjudication that the contingency has happened, if the statute either expressly or by proper construction made those officers the judges of the fact.

In discussing the question, I shall assume, for the purposes of the argument, that the following contentions of the plaintiff are correct: First, that there is no *power* in the Board of Commissioners to do anything under the Act, unless the Board of Supervisors first declare their adoption of the scheme of the Act under Sec. 21; and that the Commissioners cannot, by any act or decision of theirs, supply the absence of this declaration of the Supervisors. Secondly, that the jurisdiction of the County Court extends no further than the report, and that the Court does not pass upon the regularity of the proceedings of the Commissioners with reference to giving notice to property-owners and similar acts.

Having made these concessions, for the sake of argument, the question remains: What, if any, is the legal effect of the recital in the bond executed by the Commissioners, that it is issued under the Statute?

I shall seek to establish that this recital is, in favor of a *bona fide* holder, a conclusive adjudication of the following facts: 1st. The due giving of the notice under Sec. 6. 2d. The due making of the report of damages and benefits provided for in Sec. 7. 3d. The leaving of the report in

the office of the Board for thirty days, as provided in Sec. 7. 4th. The due publication of twenty days' notice provided in Sec. 7.

I contend that these are all acts to be performed by the Board; and, if, as it is asserted, the County Court has no jurisdiction to pass upon them, then, the determination of their due performance is, by the Statute delegated to the Board; and the recital in the bond that it is issued under the law, is an authoritative declaration by the Board, that all these things have been done according to law, and is conclusive in favor of a *bona fide* holder of the bonds.

I understand this to be the doctrine of *Meyer* vs. *Brown*, 3 W. C. R., 760. In that case, the President of the Board of Supervisors, the Clerk of the Board and the Treasurer, were authorized to issue bonds to fund all *legal* claims against the City of Sacramento. The Act did not, in terms, appoint anyone to determine what were legal claims against the City.

The Court said:

"True, the Act of 1858 (Stats. 1858, p. 280) provided that all 'legal' claims might be funded; but, as we understand the provisions of that Act, the President of the Board of Supervisors, the Clerk of the Board, and the Treasurer, were authorized to determine, on behalf of the City and County of Sacramento, the legality of each claim presented, and, if satisfied of its legality, to issue a bond or bonds therefor. * * * The bonds recite that they were issued in accordance with the law of 1858; they, and the coupons attached, are signed and authen-

ticated as required by the law. They are exactly such bonds as would have been authorized, had the officers of the city and county indisputably allowed only 'legal debts and liabilities' of the former corporation, the City of Sacramento. At the trial, the *bona fides* of the plaintiff being conceded, there was but one question to be decided, to wit: Were the bonds such as the city and county had power to issue? No question of irregularity, or even fraud, on the part of the agents of the municipality, could be considered. *Roneden* vs. *Jersey City*, 17 Rep., 253; *East Lincoln* vs. *Davenport*, 94 U. S., 801; *Pompton* vs. *Cooper Union*, 101 ib., 196; *Sherman* vs. *Simmons*, 109 ib., 757; *Louisiana* vs. *Pilsbury*, 105 ib., 278."

This decision is of the utmost importance, as it establishes all I claim in this branch of my argument. It decides that: *first*, where a Statute authorizes officers to issue bonds upon the happening of a contingency, *e. g.*, the existence and presentation to them of a legal claim against a municipality, and the statute does not, in terms, appoint a tribunal to determine the fact of the existence or presentation of the claim, the officers charged with the duty of issuing the bonds, are, themselves, made by the law the judges of the question; *secondly*, the recital in the bond executed by these officers, that it is issued in accordance with the law, is an adjudication by these officers of the existence of the fact submitted to their determination; *thirdly*, in favor of a *bona fide* holder of the bond, the adjudication, evidenced by that recital, is conclusive.

If we apply these principles to the case at bar,

they will afford a ready answer to the question of the effect of the recital in the bonds.

Grant that the giving of the notices and the making of the report, provided in Secs. 6 and 7, are conditions precedent to the right of the Board to issue bonds; still, who is to determine whether these things have been done? It is said that the County Court has nothing to do with the matter. If this be conceded, then, the Commissioners must determine them—else they must remain forever open.

I propose to examine this subject, and state various propositions which I understand, control it.

1. *Whenever power is granted to a municipality or its agents to issue bonds upon the happening of a certain contingency, if authority to determine the question of the existence of the contingency, be expressly or impliedly conferred upon the municipality or its agents, their determination and decision of the fact is final; and, as between a bona fide holder of the bonds and the obligor, all further agitation of the question is forever foreclosed.*

I might content myself with a reference to the repeated adjudications which have established the rule. It may be well, however, to discuss it in its origin and development.

To hold that the existence of the conditions was a question forever open, would lead to most

inconvenient results, would destroy the value of the bonds, and breed disaster, as well to the obligor as the obligee.

Grant that, in the present case, for instance, publication of notices under Sections 6 and 7 is a condition precedent to the issuance of the bonds. Still, is the question, whether or not the notices were published, to remain open, as a question of fact, until the last bond and coupon shall have been paid? The bonds have twenty years to run. May the obligor, at any time within those twenty years, compel each individual bondholder to litigate with it the question of due publication? Whether the publication was for the requisite length of time? Whether the papers were selected by the Board? Whether the notices were published in the body of the paper instead of the supplement? May these questions be raised twenty years hence, when witnesses are dead, papers lost, records destroyed? A doctrine leading to such results is so disastrous—so destructive of the true value of the bond, and of the objects which it is intended to subserve—that it would be amazing to find it approved by any system of rational jurisprudence.

Grant that it is important that the conditions precedent to the issue of the bonds should be observed—that the facts should exist; still, as the determination of the existence of those facts must,

at some time, be established by the judgment of some human tribunal, wisdom and sound policy certainly dictate that the determination should precede, and not follow, the issuance of the bonds.

Speaking upon this subject, the Supreme Court of the United States has said:

"It is very obvious that, if the act of the Legislature which authorized an issuance of bonds in aid of the construction of the railroad, on the written assent of two-thirds of the resident taxpayers of the town, intended that the holder of the bonds should be under obligation to prove, by parol evidence, that each of the two hundred and fifty-nine names, signed to the written assent, was a genuine signature of the person who bore the name, the proffered aid to the railroad company was a delusion. No sane person would have bought a bond, with such an obligation resting upon him, whenever he called for payment of principal or interest. If such was the duty of the holder, it was always his duty. It could not be performed once for all. The bonds, retained in the hands of the company, would have been no help in the construction of the road. It was only because they could be sold, that they were valuable. Only thus could they be applied to the construction. Yet, it is not to be doubted that the Legislature had in view, and intended to give, substantial aid to the railroad company, if a sufficient number of taxpayers assented. They must have contemplated that the bonds would be offered for sale, and it is not to be believed that they intended to impose such a clog upon their salableness, as would rest upon it, if every person proposing to purchase was required to inquire of each one whose name appeared to the assent, whether he had, in fact, signed it."

Town of Venice vs. *Murdock*, 92 U. S., 497, 498.

"Conceding as we do, that the authority to make the subscription was, by the eleventh section of the act, made dependent upon the result of the submission of the question, whether

the town would subscribe to a popular vote of the township, and upon the approval of the subscription by a majority of the legal voters of the town voting at the election, a preliminary inquiry must be: How is it to be ascertained whether the directions have been followed, whether there has been any popular vote, or whether a majority of the legal voters present at the election did, in fact, vote in favor of a subscription? Is the ascertainment of these things to be before the subscription is made, and before the bonds, are issued; or must it be after the bonds have been sold, and be renewed every time a claim is made for the payment of a bond or a coupon? The latter appears to us inconsistent with any reasonable construction of the Statute. Its avowed purpose was to aid the building of the railroad by placing in the hands of the railroad company the bonds of assenting municipalities. These bonds were intended for sale; and it was rationally to be expected that they would be put upon distant markets. It must have been considered that, the higher the price obtained for them, the more advantageous would it be for the company, and for the cities and towns which gave the bonds in exchange for capital stock. Everything that tended to depress the market value was averse to the object the Legislature had in view. It could not have been overlooked that their market value would be disastrously affected, if the distant purchasers were under obligation to inquire before their purchase, or whenever they demanded payment of principal or interest, whether certain contingencies of facts happened before the bonds were issued—contingencies, the happening of which it would be almost impossible for them, in many cases, to ascertain with certainty. Imposing such an obligation upon the purchaser would tend to defeat the primary purpose the Legislature had in view; namely, aid in the construction of the road. Such an interpretation ought not to be given to the Statute, if it can reasonably be avoided; and we think it may be avoided."

Town of Coloma, vs, *Eaves*, 92 U. S., 487–488.

See further to the same effect :

Bissell vs. *City of Jeffersonville*, 24 How. 287.

Knox vs. *Aspinwall*, 21 How., 539.

People vs. *Hagar*, 52 Cal., 171–183,

Therefore is it, that Courts have avoided giving Statutes such an unreasonable construction as that insisted upon by the plaintiff here, and have always sought to read them so as to find in them the creation of a tribunal vested with authority to decide, before the issuance of the bonds, upon the existence of the conditions precedent, and whose adjudication, upon that point, should be final and conclusive upon all parties. Hence, the doctrine is firmly established, that :

2. *If power is given to a Court, Board or officer to issue bonds, when a certain event has happened, or, upon the performance of certain conditions, and the Statute does not, in terms, appoint a tribunal to adjudicate the happening of the event or the conditions, it will be inferred that power to make such an adjudication is vested in the Court, Board or officer.*

In *Town of Coloma* vs. *Eaves*, 92 U. S., 484, the municipal officers were not to act until the assent of a majority of the voters had been obtained.

The Supreme Court of the United States said :

"At some time or other, it is to be ascertained whether the directions of the Act have been followed ; whether there was

any popular vote; or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for all; and the only persons spoken of, who have any duties to perform respecting the election, and action consequent upon it, are the Town Clerk and the Supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the Legislature intended that those officers, or one of them at least, should determine whether the requirements of the Act, prior to a subscription to the stock of a railroad company, had been met.

"If, therefore, there could be any obligation resting on persons proposing to purchase the bonds purporting to be issued under such legislative authority, and, in accordance with a popular vote, to inquire whether the provisions of the statute had been followed, or whether the conditions precedent to their lawful issue had been complied with, the inquiry must be addressed to the Town Clerk, or executive officer of the municipality,—to the very person whose duty it was to ascertain and decide what were the facts. The more the statute is examined, the more evident does this become. The eleventh section (quoted above) declared, that if it should appear that a majority of the legal voters of the city, town or township, voting, had voted 'for subscription,' the executive officer and Clerk should subscribe and execute bonds. 'If it should appear,' said the Act. Appear when? Why, plainly, before the subscription was made and the bonds were executed; not afterwards. Appear to whom? In regard to this, there can be no doubt. Manifestly, not to a Court, after the bonds have been put on the market and sold, and when payment is called for; but, if it shall appear to the persons whose province it was made to ascertain what had been done preparatory to their own action, and whose duty it was to issue the bonds, if the vote appeared to them to justify such action under the law. These persons were the Supervisor and Town Clerk. Their right to issue the bonds was made dependent upon the appearance to them of the performance of the conditions precedent. It certainly devolved upon some person or persons to decide this preliminary question; and there can be no doubt who was intended by the law to be the arbiter. In

Commissioners vs. *Nichols*, 14 Ohio St., 260, it was said that 'a statute, in providing that county bonds should not be delivered by the Commissioners *until* a sufficient sum had been provided by stock subscriptions, or otherwise, to complete a certain railroad, and imposing upon them the duty of delivering the bonds *when* such provision had been made, *without* indicating any person or tribunal to determine that fact, *necessarily* delegates that power to the Commissioners: and, if delivered improvidently, the bonds were not to be invalidated."

To the same effect are the following cases:

Bissell vs. *City of Jeffersonville*, 24 How., 287.

Knox vs. *Aspinwall*, 21 How., 539.

Humboldt Township vs. *Long*, 92 U. S., 642.

Marcy vs. *Township of Oswego*, 92 U. S., 637.

County of Moultrie vs. *Savings Bank*, 92 U. S., 631.

Town of Venice vs. *Murdock*, 92 U. S., 494.

St. Joseph Township vs. *Rodgers*, 16 Wall., 644.

Lewis vs. *Commissioners*, 105 U. S., 739.

County of Clay vs. *Society for Savings*, 104 U. S., 579.

Commissioners vs. *January*, 94 U. S., 202.

Commissioners vs. *Bolles*, 94 U. S., 104.

Lynde vs. *The County*, 16 Wall., 6.

Grand Chute vs. *Winegar*, 15 Wall., 355.

Learned vs. *Burlington*, 4 Wall., 275.

Therefore, it has been further established that:

3. *Whenever the proper Court, Board or officer, upon whom the statute expressly or by implication casts the duty of deciding the existence of the conditions precedent, has decided, and has, in some authentic manner, promulgated its decision, that adjudication is conclusive in favor of a* BONA FIDE *holder of the bonds. Hence, when the officers, who are to pass upon the question, are also the officers who are to execute the bonds, if the bonds so executed bear, upon their face, a recital of the existence of the conditions, this is a declaration of the decision by the proper officers, and is conclusive in favor of a* BONA FIDE *holder for value.*

Says the Supreme Court of the United States in a case already cited :

"In the present case, the person or persons whose duty it was to determine whether the statutory requisites to a subscription and to an authorized issue of the bonds had been performed, were those whose duty it was also to issue the bonds in the event of such performance. The statute required the Supervisor, or other executive officer, not only to subscribe for the stock, but also, in conjunction with the Clerk, to execute bonds to the railroad company in the name of the town for the amount of the subscription. The bonds were required to be signed by the Supervisor or other executive officer, and to be attested by the Clerk. They were so executed. The Supervisor and the Clerk so signed them, and they were registered in the office of the Auditor of the State, in accordance with an Act requiring that, precedent to their registration, the Supervisor must certify under oath to the Auditor that all preliminary conditions to their issue required by the law had been complied with. On each bond the Auditor certified the registry. It was only after this that they were issued. And the bonds themselves recite that they

'are issued under and by virtue of the Act incorporating the railroad company,' approved March 24, 1869, 'and in accordance with the vote of the electors of said Township of Coloma, at a regular election held July 28, 1869, in accordance with said law.' After all this, it is not an open question as between a *bona fide* holder of the bonds and the Township, whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the Township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision; and beyond those a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but, whether that has happened or not is a question of fact, the decision of which is by law confided to others—to those most competent to decide it—and which the purchaser is, in general, in no condition to decide for himself. This we understand to be the settled doctrine of the Court."

"Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for, the recital is itself a decision of the fact by the appointed tribunal.

Town of Coloma vs. *Eaves*, 92 U. S., 489-90.

Furthermore: It is not necessary that the recital of the bonds should, in express terms, set

forth the existence of the facts, whose existence is made a condition precedent to the issuance of the bonds. It is sufficient, if it does so by necessary implication. Hence, it is the established doctrine that:

4. *If the bond is executed by the officers upon whom the duty of determining the performance of conditions precedent is cast, and it bears upon its face the recital that it is issued in conformity with the law, such a recital is an adjudication by the proper authority that the conditions made by law precedent to the issuance of the bond existed.*

This rule will be found in the following familiar cases:

School District vs. *Stone*, 106 U. S., 187.
Commissioners vs. *Bolles*, 94 U. S., 104.
County of Clay vs. *Society for Savings*, 104 U. S., 579.
Bonham vs. *Needles*, 103 U. S., 648.
Buchanan vs. *Litchfield*, 102 U. S., 278.
Pompton vs. *Cooper's Union*, 101 U. S., 196.
Orleans vs. *Platt*, 99 U. S., 676.
Humboldt Township vs. *Long*, 92 U. S., 642.
Pana vs. *Bowler*, 107 U. S., 529.
Montclair vs. *Ramsdell*, Id., 147.

This doctrine had its origin twenty-five years ago, in the celebrated case of *Knox County* vs. *Aspinwall*, 21 How., and has steadily been ad-

hered to in an unbroken line of decisions, extending from that time down to the last volumes of the United States Reports:—*Sherman County* vs. *Simmons*, 109 U. S, 735, and *Dixon County* vs, *Field*, 111 U. S., 83.

If we apply these principles to the case in hand, the result cannot be doubtful. The result is:

5. *The Board of Dupont Street Commissioners, being charged by the Act with the duty of acting and issuing bonds, upon the happening of certain conditions, viz; the giving of certain notices, the making of a certain report, and the leaving that report for a certain length of time open for inspection at a given place; and no other tribunal being constituted to pass upon these questions, the board itself is clothed with authority to decide them. The recital in the bonds executed by the board that they are issued in conformity withe Act, is a decision. In favor of a bona fide holder of the bonds, that decision is final and conclusive.*

The Board of Dupont Street Commissioners is created by statute, and is vested by the statute with authority to issue bonds. The board is to act upon the happening of certain events—the giving of certain notices, making a certain report, affording certain opportunities for inspection.

Grant that the existence of all these things, in the terms prescribed by law, is a condition prece-

dent. Still I ask: Is the question whether the notices have been given, whether the report has been made, whether the requisite opportunity for examination has been afforded, to be decided before the issue of the bonds, or is it to remain open forever thereafter? In the light of the foregoing discussion, it cannot be doubted that it is to be decided before the bonds issue.

But by whom? If the County Court has no power over the question, then, the statute does not, in express terms, point out the tribunal. The board are to act whenever these things have happened. They, therefore, no one else being authorized to take action in the matter, must determine whether they have happened or not.

The decision by the board upon this point is necessarily final in favor of a *bona fide* holder of the bonds. The recital in the bond here, that it is issued under the provisions of the Act, is an adjudication and declaration that this condition precedent, which it was in the power of the board to determine, existed. Behind that recital, as regards a *bona fide* holder, the obligor of the bond cannot go; and the obligee is not bound to go.

"The bonds recite that they were issued under, and in pursuant to, the orders of the Board of Supervisors of Clay County, as authorized by virtue of the laws of the State of Illinois. The Act of November 6, 1849, authorized the Judges of the County Court to issue the bonds, only in case a majority of the voters of the county, taking as a standard the number of votes thrown

at the next preceding general election, should vote in favor of the proposition to subscribe to the stock of some designated railroad company, and pay for it by the issue of county bonds The ultimate decision of the question whether such a vote had been cast was, therefore, left with the Judges of the County Court. The recital of the bonds, that they were issued pursuant to the orders of the Board, the successor of the County Court, as authorized by virtue of the laws of the State of Illinois, is equivalent to a declaration by the Board, upon the face of the bond, that the election had been held, and had resulted so as to authorize the lawful issuing of the bonds. When the bonds are in the hands of a *bona fide* holder, this recital is conclusive and binding upon the municipality.

"The recital that they were issued in conformity with the laws of the State, as already shown, is binding on the county when suit is brought on the bonds by a *bona fide* holder, and concludes the county from setting up any irregularities in their issue, if any existed."

County of Clay vs. *Society for Savings*, 104 U. S., 579, 583–6–9.

See also the following cases:

Walnut vs. *Wade*, 103 U. S., 683.
Bonham vs. *Needles*, 103 U. S., 648.
Hackett vs. *Ottawa*, 99 U. S., 86.
County of Macon vs. *Shores*, 97 U. S., 272.
County of Warner vs. *Marcy*, 97 U. S., 96.
San Antonio vs. *Mehaffy*, 96 U. S., 312.
Commissioners vs. *Bolles*, 94 U. S., 104.
Chambers County vs. *Cleves*, 21 Wall., 317.
Learned vs. *Burlington*, 4 Wall., 275.
Van Hostrup vs. *Madison City*, 1 Wall., 291.
Mercer County vs. *Hackett*, 1 Wall., 83.

Moran vs. *Commissioners of Miami*, 2 Black., 722.

Amey vs. *Mayor*, 24 How., 364.

Sherman County vs. *Simons*, 109 U. S., 735.

To resume, and restate the proposition generally in this case:

6. *The plaintiff being the holder in good faith, for value and before maturity, of a municipal bond, issued by officers, empowered to issue it upon the existence of certain conditions precedent, and the bond containing a recital that it is issued under the provisions of the act authorizing it, the existence of the conditions is, as to the plaintiff, conclusively established by the recital.*

The defendant relies upon the late case of *Dixon County* vs. *Field*, 111 U. S., 83, to sustain a contrary doctrine; but—

7. *The decision in Dixon County* vs. *Field, far from overthrowing, confirms and illustrates all the principles which I have hereinabove maintained.*

In that case, the county had "no legislative authority to create a debt in excess of ten per cent. upon the assessment." (p. 90.) It issued $87,000 of bonds, each one of which, upon its face, recited that it was "one of a series of eighty-seven thousand dollars, issued * * * under and by virtue of" the Statute and Constitution of the State. The amount of the bonds exceeded ten

per cent. of the assessment, which, as "*was shown and appeared from the books of public record of said county*, was $587,331, and no more." (p. 86.)

The question which arose was: Does the recital in the bond, that it is issued "under and by virtue of" the law, constitute a conclusive adjudication against the county, "that everything necessary, by law, to be done has been done, and every fact necessary, by law, to have existed, did exist, to make the bonds lawful and binding?" (p. 92.)

The decision establishes the following propositions:

(a.) A general recital in the bond, that it has been issued in conformity with the law, is as efficacious as a specific enumeration of the existence of each particular fact essential to the validity of the bond.

"It is not necessary," says the Court, "that the recital should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds have been issued in conformity with the law will suffice. * * * A determination and statement as to the whole series, where more than one is involved, is a determination and certificate as to each essential particular." [pp. 92 93.]

(b.) The recital, whether general or specific, is determinative and conclusive of those FACTS, *only, which the officers executing the bond had authority to inquire into and determine.*

"There must be authority vested in the officers by law, as to each necessary fact, whether enumerated or non-enumerated, to ascertain and determine the existence, and to guarantee to

those dealing with them the truth and conclusiveness of their admissions" (p. 93.)

(*c.*) *The vital question, then in each case, is "whether in the particular case under consideration, a fair construction of the law authorized the officers issuing the bonds to ascertain, determine, and certify the existence of the facts upon which their power, by the terms of the law, was made to depend."* (*p. 94.*)

(*d.*) *The authority thus to decide will not be held to exist, first: where the statute grants "a power to issue bonds, upon the existence of a state of facts to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds"* (p. 93); *secondly, where "the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some* EXPRESS AND DEFINATE RECORD OF A PUBLIC CHARACTER." (p. 93.)

(*e*) *The authority thus to decide the question of fact will be held to exist in the officers executing the bonds, whenever the right to issue them depends upon the existence of a state of facts, which can be ascertained only by an investigation and examination* IN PAIS *and no other tribunal than the officers issuing the bonds has been appointed by the statute to make the decision.*

This rule is clearly established by *Marcy* vs. *Township of Oswego*, 92 U. S., 637, cited with approval, and confirmed, in *Dixon* vs. *Field*. In that case, the County Commissioners were, before issuing the bonds, to order an election.

"The Board was to order the election if certain facts existed, and only then. *It was required to act, if fifty freeholders, who were voters of the township, petitioned for the election;* if the petition set out the amount of stock proposed to be subscribed; if that amount was not greater than the amount to which the township was limited by the act; if the petition designated the railroad company; if it pointed out the mode and terms of payment. Of course, *the board and it only, was to decide whether these things precedent to the right to order an election were actual facts. No other tribunal could make the determination*, and the members of the Board had peculiar means of knowledge beyond what any other persons could have. Moreover, *these decisions were to be made before they acted, not after the election, and after the bonds had been issued.*

"*The order for the election, then, involved a determination by the appointed authority that the petition for it was sufficiently signed by fifty freeholders, who were voters; that the petition was such a one as was contemplated by the law;* and that the amount proposed by it to be subscribed was not beyond the limit fixed by the Legislature.

"So also the subsequent issue of the bonds containing the recital above quoted, that they were issued 'by virtue of and in accordance with' the legislative act, and in 'pursuance of and in accordance with the vote of three-fifths of the legal voters of the township' was another determination, not only of the result of the popular vote, but that all the facts existed which the statute required in order to justify the issue of the bonds.

"*It is to be observed that every prequisite fact to the execution and issue of the bonds was of a nature that required examination and decision.* The existence of sufficient taxable property to warrant the amount of the subscription and issue was no more essential to the exercise of the authority conferred upon the

Board of County Commissioners, than was the petition for the election, or the fact that fifty freeholders had signed, or that three-fifths of the legal voters had voted for the subscription. *These are all extrinsic facts*, bearing not so much upon the authority vested in the Board to issue the bonds, as upon the question whether that authority should be exercised. *They are all, by statute, referred to the inquiry and determination of the Board*, and they were all determined before the bonds and coupons came into the hands of the plaintiff. He was, therefore, not bound, when he purchased, to look beyond the Act of the Legislature, and the recitals which the bonds contained."

If we make application of these principles to the case of Dupont Street, we will find, that the recital by the Board that the bonds are issued under the provisions of the Act, conclusively establishes the giving of the requisite notices and the other facts hereinabove stated, if the sufficiency of these notices and other facts were a "fact of a nature that required examination and decision," and if a "fair construction of the law authorized the officers issuing the bonds (the Board) to ascertain, determine and certify" the existence of the facts. On the other hand, the recital will not be conclusive, if the sufficiency of these notices and other facts were determinable "by reference to some express and definite record of a public character," or was "to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds."

It is clear, I submit, that the question of the sufficiency of the publication involves investigations of fact which "require examination and de-

cision," and could, at no time, be ascertained "by reference to some express and definite record of a public character."

It is equally clear, I submit, that, if the County Court has no jurisdiction of the question, the Board of Commissioners, who perform these various duties, are, by "a fair construction of the law, authorized to ascertain, determine and certify" the sufficiency of their own acts.

If what I have already contended for, as to the effect of the recital in the bond, is correct, that recital establishes, in itself, upon the plaintiff's own theory of the law, every condition essential to the validity of the bond, except the resolution or order of the Board of Supervisors and the judgment of the County Court. The resolution, I have already endeavored to show, was regularly adopted; and there is no question as to regularity of the judgment of the County Court.

VI.

THE CITY OF SAN FRANCISCO IS ESTOPPED TO DENY THE VALIDITY OF THESE BONDS, BECAUSE (1): ITS RETENTION OF THE FRUITS OF THE BONDS ESTOPS IT FROM ALLEGING ANY INFORMALITY IN THE PROCEEDINGS WHICH LED UP TO THE ISSUE OF THE BONDS; AND, (2): ITS OWN ACTION IN VOLUNTARILY ADOPTING THE STATUTE AND REAPING THE BENEFITS CONFERRED BY IT, ESTOPS IT

FROM AVOIDING THE BURDENS WHICH IT IMPOSES, UPON THE GROUND OF ITS UNCONSTITUTIONALITY.

1. Nothing is better settled in the law of municipal bonds than that the municipality is estopped by its retention of the benefits of the bonds from setting up any irregularity in their issue; the insufficiency of the publication of the resolution of the Board of Supervisors, or of the notices given by the Commissioners, or the irregularity in the assessment, or the misconduct of the Board are matters which cannot be set up by the City as long as it retains the fruits of the bonds.

These bonds were issued in payment of land taken for a certain public street, which the City of San Francisco acquired title to, took possession of, and enjoys to this day as a public thoroughfare. Under these circumstances, the City is not permitted to assert any irregularity or informality in the issuance of the bonds.

That this is well settled in this State and elsewhere, see:

Nevada Bank *vs.* Steinmetz, 64 Cal., 314.
Meyer *vs.* Brown, 3 W. C. R., 761,
Supervisors *vs.* Schenck, 5 Wall., 772.
Jones on R. R. Securities, Secs. 280–282.
County of Davies *vs.* Huydekoper, 98 U. S., 98.
County of Moultrie *vs.* Fairfield, 105 U. S., 380.

County of Ray *vs.* Vansyckle, 96 U. S., 675.
Commissioners *vs.* January, 94 U. S., 202.
Pendleton County *vs.* Amy, 13 Wall., 297.
Rogers *vs.* Burlington, 3 Wall., 654.

2. The City of San Francisco, having, by its Board of Supervisors, voluntarily declared its acceptance of the provisions of the statute, and having, by its own free will, given vitality to an Act which would otherwise have remained inoperative, and having, through that Act, obtained an advantage in the widening of one of its streets, can not now, for the purpose of avoiding the burdens imposed upon it by the Act, allege its unconstitutionality.

The same rules of universal justice and right which apply to the conduct of individuals, apply equally to municipalities. As was said by this Court, in *Meyer* vs. *Brown*, "there is no more reason to permit a municipal government to repudiate its solemn obligations, entered into for value, than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one, equally with the other."

It is not in accordance with good faith and fair dealing, and, I might add, would not be consistent with common sense, to permit a person voluntarily to reap the benefit of a statute, and, at the same time, avoid its burdens by claiming that it is un-

constitutional. *Qui sentit commodum sentire debet et onus*, is a maxim as old as the science of jurisprudence.

It is, accordingly, well settled, that one who, by his own voluntary action, sets an Act of the Legislature in motion, or is active in reaping its benefits, can not set up its unconstitutionality, nor the irregularity of proceedings taken under it, to avoid its burdens.

This subject I have already sufficiently discussed.

In the case at bar, the obligation springing from these bonds is sought to be avoided on the ground of irregularity in the proceedings, and unconstitutionality in the Act. A specimen of these grave irregularities is found in the objection that the ordinance which appears regularly adopted and approved in the records of the Board of Supervisors was, on one day, published in the supplement instead of in the body of a newspaper. For this insignificant defect—if defect it be—the city claims the right, while retaining all the advantages, to avoid all the obligation, of one million dollars of bonds issued by it. Is this justice? Is this fair dealing? Would not such conduct be considered dishonorable in a private citizen? Can the city—the aggregation of individuals—honestly do what it would be dishonest in any individual member of

it to do? As said by the Supreme Court of Iowa, on a similar occasion: "It would be manifestly against every principle of justice, to allow the taxpayers of the township through the defendant, to escape liability from a tax for so slight a defect, if it be one, under the circumstances stated."[1]

The same reasons apply to the alleged unconstitutionality of the Act. The City has taken the land for a public use; it uses it to-day as an avenue of travel. The property which it has taken destroyed, or damaged, it has paid for with these bonds. Can the City now stultify itself, by alleging that, all the while, the law under which it acted was unconstitutional—was no law? Is the law good to enable it to hold on to what it has got, but bad to enable it to shirk the payment which it has promised? Would that be honesty or fair dealing?

I submit, that the estoppel upon the City is complete, and shuts it off from the defense of irregularity in the proceedings or unconstitutionality in the Act.

VII.

IF THE BONDS ARE VALID AGAINST THE MUNICIPALITY, THEIR VALIDITY CANNOT BE ATTACKED BY ANY MEMBER OF THE MUNICIPALITY.

If the city of San Francisco cannot set up any

[1] The B. C. R. M. R. Co. *vs.* Stewart, 39 Iowa, 267, 270.

irregularity in these proceedings, or any unconstitutionality in the Act, it is evident that the individual taxpayers therein can not. If the city is bound by the obligations of these bonds, the individuals who compose the city are equally bound. Assume that a suit was brought to-morrow against the City to recover upon these bonds. If the propositions for which I have contended are sound, the City could not set up either irregularity in the proceedings or unconstitutionality in the Act. A judgment would necessarily go against it, payable out of the special tax provided by the Act. Now, if, when that tax comes to be collected, each individual taxpayer can set up the defense which the City could not, then the estoppel against the City is a mere empty farce.

What do we mean when we say that a City is bound by obligation? We mean that the human beings composing the corporation are bound, each according to his legal proportion. What do we mean when we say that a city is estopped to deny an obligation? We mean that the human beings composing the City are each estopped to deny his proportionate share of the burden of that obligation. When we say, therefore, that the City of San Francisco is, by its conduct, estopped from setting up irregularities in these proceedings or unconstitutionality in this Act, we simply mean that certain officers, made, by law, the agents of a

certain number of men, living in a designated region, have so acted, in their representative capacity, that the persons whom they represented are bound or estopped.

If this is not the meaning of these legal phrases, they mean nothing. I have shown that a municipality which has issued bonds is estopped by a retention of the benefits from alleging irregularities in the proceedings. This has always been insisted upon, and considered as a valuable protection to the holder of the bond. But, of what value is it, if each individual taxpayer in the County is not bound by the same estoppel? Of what value is this estoppel against the County, if, when the tax to pay the bonds comes to be collected, each individual taxpayer may defeat it by setting up these irregularities? If estoppel upon the County does not mean estoppel upon every taxpayer of the County, it amounts to nothing and means nothing.

If, in the present case, the City is estopped, then, so are the plaintiffs.

In conclusion, I submit:

First. The Dupont Street Act is, in itself, constitutional, and all the steps required to be taken under it, to give validity to the bonds, have been duly taken.

Secondly. The judgment of the County Court

is, in the hands of a *bona fide* holder of the bonds, a shield against all assaults upon the constitutionality of the Act, and the regularity of the proceedings.

Thirdly. The ordinance having been regularly passed by the Board of Supervisors, and the judgment of the County Court being regular on its face, the recital in the bonds that they are issued in pursuance of the provisions of the Act, is a conclusive adjudication in favor of a *bona fide* holder, that all the steps between the ordinance and the judgment have been duly and regularly taken.

Fourthly. The City is estopped, by its conduct in voluntarily adopting the Act and reaping all its benefits, from denying the constitutionality of the statute and the regularity of the proceedings, and this estoppel extends to every landholder of the district.

It is submitted, that the one million dollars of Dupont Street bonds, issued by the city of San Francisco, are valid.